Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ZAPATA HERMANOS SUCESORES, S.A., PETITIONER,

v.

HEARTHSIDE BAKING CO. D/B/A MAURICE LENELL COOKY CO., RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether attorneys' fees and litigation expenses qualify as a recoverable form of "loss" under Article 74 of the United Nations Convention on Contracts for the International Sale of Goods where such fees and expenses are foreseeable to the breaching party as a possible consequence of the breach at the time of contracting.

2. Whether the court of appeals, consistent with decisions of the First and Third Circuits, but in conflict with those of the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh and Federal Circuits, erred in holding that federal courts lack the inherent power to sanction a party for bad faith conduct where such conduct is potentially sanctionable by statute or rule.

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PETITION FOR A WRIT OF CERTIORARI

Zapata Hermanos Sucesores, S.A. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-10a) is published at 313 F.3d 385. The decisions of the district court (App., *infra*, 11a-32a) are reported at 2001 WL 1000927 and 2002 WL 398521.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2002. A timely petition for rehearing and suggestion of rehearing en banc was denied on January 9, 2003. App., *infra*, 33a-34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The United Nations Convention on Contracts for the International Sale of Goods, 15 U.S.C.A. App., is reproduced, in pertinent part, at App., *infra*, 35a-36a.

STATEMENT

1. Petitioner Zapata is a family-owned manufacturer of tin products located in Mexico City, Mexico. Respondent Maurice Lenell Cooky Co. is a producer of baked goods located in Chicago, Illinois. From 1996 to 1999, Zapata sold to Lenell 1.6 million specially manufactured cookie tins that Lenell ordered at a purchase price of approximately $950,000. Lenell received, accepted and used the cookie tins without complaint, but failed to pay for them. In early 1999, Zapata informed Lenell that it would not accept any further orders until Lenell paid for the tins it already received. Lenell responded by threatening that if Zapata did not continue to fill new orders, Zapata would never be paid because "former suppliers [do not] have any priority for payment."App., *infra*, 21a. Lenell then made good on its threat, never paying for the tins even though its own accounting records showed the money was owed. *Id.*

Zapata thus was forced to bring this action seeking payment of the purchase price plus contractually specified interest, pursuant to the United Nations Convention on Contracts for the International Sale of Goods, 15 U.S.C.A. App. ("CISG"). Under Article 74 of the CISG, which permits the recovery of all "loss[es] suffered * * * as a consequence of the breach * * * which the party in breach ought to have foreseen at the time of the conclusion of the contract * * * as a possible consequence of the breach of contract," Zapata sought recovery of its attorneys' fees and litigation expenses as damages foreseeably caused by Lenell's unjustified refusal to pay.

2. In the litigation, Lenell continued to make good on its threat by making it as difficult and expensive for Zapata to obtain payment. For instance, the district court found that Lenell denied all liability throughout the litigation when it "had absolutely no defense to payment of invoices totaling $857,796.90."App., *infra*, 21a. The court also found that

> Lenell dramatically expanded the scope of this litigation, including discovery and the trial, by forcing Zapata to undertake the difficult and time-consuming task of proving its entitlement to payment for more than 100 invoices that Lenell knew full well it was obligated to pay.

Ibid. Lenell also "hopelessly complicated" the litigation "by creating the need to investigate, prepare for and successfully oppose Lenell's late-advanced, convoluted, multifarious and (regrettably) baseless defenses and counterclaims." *Id.*, 25a.

Following discovery, the case was tried to a jury. At the close of the evidence, the district court granted Zapata judgment as a matter of law as to 93 of the 110 unpaid invoices totaling $857,796.90, rejecting virtually all of Lenell's defenses as a matter of law (rulings that Lenell did not appeal). The court also granted Zapata judgment as a matter of law on all but two of Lenell's counterclaims (rulings that Lenell also did not appeal). The jury then returned a verdict in Zapata's favor on its claim for contractual interest and against Lenell on its remaining

counterclaims. The court entered final judgment in Zapata's favor in the amount of $1,176,350.95.

After trial, and by stipulation of the parties, the district court considered the recoverability of Zapata's attorneys' fees. The court held that these fees were recoverable under CISG Article 74 because Lenell had needlessly forced Zapata to incur them, and Lenell had stipulated that "[a]s of the dates when Lenell issued its purchase orders * * *, Lenell foresaw or should have foreseen that if Lenell failed to pay for the tins that it ordered, received and accepted, Zapata would incur litigation costs including attorneys' fees, to seek payment of the invoices for said tins." App., *infra*, 13a.

The court found that the CISG, as a treaty "defining the relationships between nationals of different signatory countries, calls for uniformity of construction," and mandates "universality rather than a purely home-town rule as to the awardability of attorneys' fees under the Convention." App., *infra*, 14a. The court thus rejected Lenell's request for "the parochial application of the American rule" that each party bear its own litigation costs. As the court explained, while "the norm in our own judicial system is for each litigant in a purely United-States-based dispute to bear the burden of its own legal expense, that does not at all equate to the notion that public policy (or anything else) forbids a federal court's judicial enforcement of a different rule that is appropriately brought into play." *Id.*, 15a. The court thus held that "when purely parochial considerations are put aside (quite properly so), it cannot be gainsaid that the normal unstrained reading of Article 74 coupled with the above-quoted Stipulation calls for Zapata's recovery of its attorneys' fees as foreseen consequential damages," and that "[w]hen the searchlight of analysis is thus properly focused on the language of the Convention without any inappropriate overlay from the American Rule, the question becomes a simple one." *Id.*, 15a-16a. The court also noted that the contrary position "is clearly refuted by the decisions cited at

Zapata Mem. 4 from other countries' courts and arbitral tribunals" holding that attorneys' fees are recoverable under Article 74. *Id.*, 16a.

The district court also imposed Zapata's attorneys' fees as a sanction against Lenell pursuant to the court's inherent power, citing *Chambers v. NASCO*, 501 U.S. 32, 53 (1991). The court found that Lenell had engaged in "extreme bad faith" conduct "both before and during this litigation" by "mak[ing] it as difficult and expensive as possible for Zapata to receive its money in this litigation" and by "dramatically and needlessly expanding the scope of this litigation * * * by interposing a host of unwarranted roadblocks" through "late-advanced, convoluted, multifarious and (regrettably) baseless defenses and counterclaims." App., *infra*, 20a-22a, 23a, 25a. The court found that by asserting this multitude of "baseless" defenses and counterclaims, Lenell succeeded in "dragging out what should have been a relatively simple collection case for goods sold and delivered * * * into an enormously time-consuming and expensive lawsuit." *Id.*, 23a.

4.a. The Seventh Circuit, with Judge Posner writing for the panel, affirmed the judgment of liability against Lenell but reversed the district court's award of attorneys' fees. The court of appeals held that the recoverability of attorneys' fees under Article 74 is not a "substantive" question governed by the CISG but rather a "procedural" question controlled by domestic law (in this case the "American rule" that each party bear its own litigation costs). According to the court of appeals, the CISG "is about contracts, not about procedure," and the recoverability of attorneys' fees is exclusively a "procedural" issue because "[t]he principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law." App., *infra*, 3a.

Without addressing any of the more than 275 decisions by courts and arbitral tribunals in other CISG signatory nations

interpreting Article 74[1]—decisions that Zapata cited and the district court relied upon—the court of appeals found that "[t]here is no suggestion in the background of the Convention or the cases under it that 'loss' was intended to include attorneys' fees, but no suggestion to the contrary either." The court also found that "the question of attorneys' fees [is] not 'expressly settled' in the Convention," and that "there are no 'principles' that can be drawn out of the provisions of the Convention for determining whether 'loss' includes attorneys' fees; so by the terms of the Convention itself the matter must be left to domestic law." App., *infra*, 2a-3a. Thus, relying solely on domestic cases applying the American rule, the court held that "'loss' does not include attorneys' fees incurred in the litigation of a suit for breach of contract." App., *infra*, 2a.

b. The court of appeals also reversed the district court's inherent power sanction. Without questioning the district court's findings of bad faith, the court of appeals set aside the sanction on the ground that "[t]he inherent authority of federal courts to punish misconduct before them is not a grant of authority to do good, rectify shortcomings of the common law * * *, or undermine the American rule on the award of attorneys' fees to the prevailing party in the absence of statute." The court of appeals held that the inherent power to sanction instead "is a residual authority, to be exercised sparingly, to punish misconduct (1) occurring in the litigation itself, not in the events giving rise to the litigation * * *, and (2) not adequately dealt with by other rules, most pertinently here Rules 11 and 37 of the Federal Rules of Civil Procedure, which Lenell has not been accused of violating." App., *infra*, 7a-8a. The court thus held that because "Lenell has not been accused of

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[1] See Felemegas (Australia), *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, to be published in 15 PACE INT'L L. REV. (Spring 2003) (http://cisgw3.law.pace.edu/cisg/biblio/felemegas4.html) (collecting decisions).

violating" Rules 11 or 37, the district court lacked the inherent power to sanction Lenell for bad faith conduct.

The Seventh Circuit saw no need to "pick through the record to see whether some of the counterclaims or other moves by Lenell during the trial were sanctionable apart from Rule 11 and Rule 37." App., *infra*, 9a. The court instead remanded for further proceedings, noting "by way of guiding further proceedings on remand * * * that to the extent that [Rules 11 and 37] place limits on the award of sanctions under them (for example by the provision of safe harbors in Rule 11), those limitations are equally limitations on inherent authority, which may not be used to amend the rules." App., *infra*, 9a.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION THAT ATTORNEYS' FEES ARE NOT RECOVERABLE UNDER ARTICLE 74 DISREGARDS THE CONTRARY DECISIONS OF OTHER SIGNATORY NATIONS AND THE PLAIN LANGUAGE OF THE CISG.

This case presents the Court with an opportunity to address for the first time the United Nations Convention on Contracts for the International Sale of Goods. As an international uniform commercial code ratified by the United States in 1986, the CISG "applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State." Art. 1(1). With 62 signatory nations, including most of the major commercial jurisdictions of the world, the CISG today is one of the most dominant sources of private international law, with a rapidly developing jurisprudence involving thousands of judicial and arbitral

decisions worldwide.[2] See generally Schlechtriem, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (Oxford 2d ed. 1998).

As the United States recognized in its instrument of ratification, the CISG "sets out substantive provisions of law to govern the formation of international sales contracts and the rights and obligations of the buyer and seller." 15 U.S.C.A. App. It also specifies the rules of construction that signatories must follow in applying the CISG. Article 7(1) requires that in any "interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." To ensure this "uniformity in [the CISG's] application," Article 7(2) requires that any

> [q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The question presented here is whether attorneys' fees are a recoverable form of consequential "loss" under CISG Article 74, where such fees are foreseen by a breaching party at the time of contracting as a possible consequence of the breach. The Seventh Circuit held that because attorneys' fees are not explicitly mentioned in Article 74, their recoverability is not "expressly settled" by the CISG and is governed by domestic law, *i.e.*, the "American rule" of attorneys' fees.

As we demonstrate below, the court of appeals' decision cannot be squared with the plain language of the CISG and disregards numerous decisions of other CISG signatory nations *consistently* holding that attorneys' fees *are* recoverable under

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[2] Decisions applying the CISG are catalogued in a database maintained by Pace University Law School. See http://www.cisg.law.pace.edu.

Article 74. In conflict with decisions of other circuits, the court also disregarded the interpretative requirements of CISG Article 7(1) by utilizing a rule of *domestic* law (*i.e.*, the "American rule" of attorneys' fees) to interpret Article 74 while ignoring general principles of the CISG that inexorably lead to the contrary reading of Article 74 adopted by the district court.

The international significance of the Seventh Circuit's decision cannot be overstated. It already has generated worldwide controversy and attention, including foreign requests for Supreme Court review.[3] This Court's review in fact is vitally needed not only to resolve the international split of authority created by the Seventh Circuit over the meaning of Article 74—"perhaps the most important remedy available under the Convention" (Felemegas (Australia), *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, to be published in 15 PACE INT'L L. REV. (Spring 2003) (available at

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[3] See, *e.g.*, Schlechtriem (Germany), *Attorneys' Fees as Part of Recoverable Damages*, 14 PACE INT'L L. REV. 205, 205 (2002) (noting that the decision below "deserves the greatest attention"); Vanto (Finland), *Attorneys' Fees as Damages in International Commercial Litigation*, to be published in 15 PACE INT'L L. REV. (Spring 2003) (available at http://www.cisg.law.pace.edu/cisg/biblio/vanto1.html) (discussing significance of this case under Finnish law, and noting that internationally this "case has garnered major attention," "possibly * * * because the case emanates from the United States, a jurisdiction which so far does not have a large CISG jurisprudence but whose rulings resonate throughout the commercial community"). See also, *e.g.*, Felemegas, 15 PACE INT'L L. REV. (noting that this case "has generated a healthy academic debate"); Felemegas, *The Award of Counsel's Fees Under Article 74 CISG, in* Zapata Hermanos Sucesores v. Hearthside Baking Co. (2001), 6 VINDOBONA J. INT'L COMM. L. & ARB. 30, 39 (2002); Colligan (U.S.), *Applying the General Principles of the United Nations' Convention on Contracts for the International Sale of Goods to Fill the Article 78 Interest Rate Gap in* Zapata Hermanos, S.A. v. Hearthside Baking Co. Inc. (2001), 6 VINDOBONA J. INT'L COMM. L. & ARB. 40 (2002); Flechtner (U.S.), *Recovering Attorneys' Fees as Damages Under the U.N. Sales Convention*, 22 NW. J. INT'L L. & BUS. (2002); Lookofsky (Denmark), Zapata Hermanos v. Hearthside Baking, 6 VINDOBONA J. INT'L COMM. L. & ARB. 27 (2002).

http://cisgw3.law.pace.edu/cisg/biblio/felemegas4.html) (collecting decisions))—but also to clarify more generally the interpretive principles that courts must follow in construing the CISG, including the extent to which courts may rely on domestic law to interpret the CISG's express terms (in this case the word "loss" in Article 74). This case presents an ideal opportunity for this Court to resolve these significant controversies and bring needed clarity to this important area of private international law.

A. The Seventh Circuit's Decision Improperly Disregards The Decisions Of Tribunals In Other CISG Signatory Nations And Misapplies The Interpretative Requirements Of CISG Article 7.

This Court held in *Air France v. Saks*, 470 U.S. 392, 399-404 (1985), that in cases involving international treaties, "considerable weight" must be given to decisions of foreign tribunals so as "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." That holding applies with particular force to the CISG, which was created for the "expressly stated goal of developing uniform international contract law to promote international trade" (*Asante Tech., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001)), and to provide greater legal certainty to the international sale of goods—transactions where "uncertainty will almost inevitably exist." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

The CISG mandates "uniformity in its application," requiring that unaddressed questions be "settled in conformity with the general principles" of the CISG and, alternatively, according to principles of private international law. Art. 7. This Court's jurisprudence and the CISG thus require, at a bare minimum, that courts applying the CISG consider decisions in other signatory nations. See Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COMM. 2:257, 261

(1997) ("Article 7(2) * * * directs courts to be guided by 'the laws applicable by virtue of the rules of private international law,' a gap filling mechanism that permits, even requires, review of relevant U.S. and foreign decisions"); Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COMM. 187, 215 (1998) ("The key to honoring the mandate of the uniformity principle in Article 7(1) is ensuring that the deliberations of decision-makers are informed by knowledge of how pertinent issues have been handled by others, particularly courts and commentators representing different legal traditions").

These express uniformity requirements and related concerns "of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability," all require that signatories abide by the CISG's international rules and principles "even assuming that a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

In this case, the court of appeals ignored these obligations, disregarding *multiple* decisions of judicial and arbitral tribunals outside the United States that not only were cited by Zapata, but were *relied upon* by the district court, all of which *consistently* hold that attorneys' fees are recoverable under Article 74.

For instance, the German Court of Appeal in Case No. 17 U 146/93 (OLG Düsseldorf Jan. 14, 1994), held that attorneys' "fees in general could be recovered under Article 74 CISG," *including* attorneys' fees that were not recoverable under local law.[4] Similarly, the Commercial Court of Switzerland has held that under Article 74, "all costs incurred in the reasonable pursuit of a claim are refundable" and that

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[4] The foreign authorities cited herein are available on the Internet. Web addresses for these decisions are reproduced in the Table of Authorities.

"pre-procedural legal costs are part of recoverable damages as long as the breach of contract gave sufficient rise for such." No. OR.97.00056 (Dec. 19, 1997) (citing Schlechtriem/Stoll, Art. 74, at 14). Accord Decision of German District Court (Amtsgericht) Viechtach in Case No. 1 C 419/01 (Apr. 11, 2002) (holding that "[t]he term 'loss' in Art. 74 sent. 1 CISG, encompasses the cost of pursuing one's rights," and that the seller there "was entitled to commission an attorney, because the [buyer] persistently refused payment").[5] See also Felemegas, 15 PACE INT'L L. REV. ("There is international case law and arbitral support for recovery of losses incurred as legal fees prior to or during litigation by a successful plaintiff in a contractual dispute by the CISG pursuant to the substantive law provisions of Art. 74"). This weight of international authority is also confirmed by the fact that Lenell has never cited a single decision by any tribunal anywhere in the world even suggesting, let alone holding, that attorneys' fees are not recoverable under Article 74.

There also is strong support in the literature for the recoverability of attorneys' fees under Article 74. For instance, Professor Schlechtriem, perhaps the leading international scholar on the history and meaning of the CISG, agrees with the district court below that under Article 74, "the costs of attorneys' fees is certainly foreseeable at the time of conclusion of the contract and thus a part of the risk undertaken."

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[5] Accord, *e.g.*, Hamburg Arbitration Proceeding (June 21, 1996) (holding that "independent" of domestic German law, attorneys' fees are recoverable damages under "Art. 61(1) in connection with Art. 74 CISG"); Case No. A3 1998 153 (District Court of Zug, Switzerland Feb. 25, 1999) (holding that "debt collection costs" are recoverable under Article 74); Case No. 2 C 22/97 (District Court of Berlin-Tiergarten, Germany Mar. 13, 1997) (holding that "damages under article 74 CISG include court and lawyer's fees"). Likewise, an Arbitral Tribunal of the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry has held that attorneys' fees and costs are recoverable under Article 74. See Case No. 227/1996 (Mar. 22, 1999).

Schlechtriem, 14 PACE INT'L L. REV. at 205. Accord Felemegas, 6 VINDOBONA J. INT'L COMM. L. & ARB. at 39 (concluding that the district "court in *Zapata* correctly treated the recovery of counsel's fees (as part of damages under the Convention) as a substantive issue governed by the agreement of the parties to the contract and supplemented by the provisions of the Convention").

Consistent with the mandate of Article 7, the district court properly considered the international precedent described above. The court of appeals, by contrast, simply ignored it. See Felemegas, 15 PACE INT'L L. REV. (criticizing the Seventh Circuit below because it "made no reference at all to CISG jurisprudence"). The Seventh Circuit thus not only created an international split of authority where none had previously existed, but also laid the groundwork for further conflict by holding that the substantive scope of Article 74—and in particular the meaning of "loss"—is to be governed by *domestic* law. Such disregard of the interpretive mandates of Article 7 must not be tolerated. As the district court held, Article 7 "mandate[s] universality rather than a purely home-town rule as to the awardability of attorneys' fees under the Convention." App., *infra*, 14a. Indeed, its very purpose was to provide "a means for interpreters to develop the law under an international convention in a manner entirely free from the influence of domestic legal norms." Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 733 (1998).

It may be that in a purely domestic case the American rule of attorneys' fees would govern. But this is *not* a domestic case, and a local preference for the American rule cannot override the U.S. obligation to adhere to and *promote* the international legal standards of the CISG. See Vienna Convention on the Law of Treaties, Art. 27, 26 UNTS 1155, at 331 (1980) ("[a] Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"). As this Court recognized long ago, "[w]e cannot have trade and commerce in world markets

and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).[6]

The CISG was crafted as a "floodgate against an all too broad recourse to domestic law," and to "prevent an all too hasty resort to domestic regulations and legal custom." Schlechtriem, UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 37 (1986). Its "primary goal was to create *uniformity* in the rules for international sales, in order to supplant the complex and difficult-to-predict system that subjected international sales to the varying provisions of national sales laws." Flechtner, 17 J.L. & COMM. at 187. The CISG's "very mandate to interpreters is to bring about international uniformity in the regulated field of law." Van Alstine, at 701.

The court of appeals' improper use of domestic law to interpret the CISG also is squarely at odds with decisions of other circuits that properly have refused to apply domestic rules in CISG cases. For instance, in *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*, 144 F.3d 1384, 1391 (11th Cir. 1998), the Eleventh Circuit refused to apply the domestic parol evidence rule in a CISG case because:

> One of the primary factors motivating the negotiation and adoption of the [Convention] was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system

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[6] The court of appeals believed that it "would produce anomalies" if a prevailing plaintiff could potentially recover its attorneys' fees under Article 74 while a prevailing defendant would not. App., *infra*, 4a. In fact, there is no anomaly at all when one considers that Article 74 is a *damages* provision—not a fee-shifting statute. It is hardly anomalous that only plaintiffs are permitted to recover damages since it is generally only they who allegedly have suffered harm.

> might otherwise apply. Courts applying the [Convention] cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the [Convention] by interpreting and applying the plain language of article 8(3) as written * * *.

Similarly, in *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories*, 201 F. Supp. 2d 236, 287 (S.D.N.Y. 2002), the court recognized that the CISG adopted a different form of promissory estoppel than that of U.S. law, but refused to apply the U.S. rule because "to apply an American or other version of promissory estoppel * * * would contradict the CISG and stymie its goal of uniformity." The court of appeals below erred for precisely this reason.

In short, the Seventh Circuit's decision "failed in its approach to the interpretation of the CISG because it did not evidence any attention at all to the several hundred available international cases on CISG Art. 74, citing solely U.S. domestic case law in support of the conclusion that 'loss' does not include attorneys' fees." Felemegas, 15 PACE INT'L L. REV. This patent misapplication of the CISG must be reversed.

B. The Court Of Appeals Misapplied The Plain Language Of CISG Article 74 And Disregarded Applicable "General Principles" Of The CISG.

CISG Article 74 provides that a party aggrieved by a contractual breach is entitled to recover for all "loss[es] which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract." App., *infra*, 36a. In this case, the district court's holding that Zapata's attorneys' fees qualify as a recoverable "loss" easily comports with the plain language of Article 74.

Lenell refused to pay for $950,000 in specially manufactured goods that it received, accepted and used, knowing full well that Zapata would have no choice but to file suit to obtain payment. Lenell even *stipulated* that at the time of contracting it "foresaw or should have foreseen that if Lenell failed to pay for the tins that it ordered, received and accepted, Zapata would incur litigation costs including attorneys fees, to seek payment of the invoices for said tins." App., *infra*, 13a. As the district court correctly held, "when purely parochial considerations are put aside (quite properly so), it cannot be gainsaid that the normal unstrained reading of Article 74 coupled with the above-quoted Stipulation calls for Zapata's recovery of its attorneys' fees as foreseen consequential damages." App., *infra*, 15a-16a.

The court of appeals reversed, holding simply that because "attorneys' fees" are not specifically mentioned in Article 74, their recoverability under Article 74 is not "expressly settled" by the CISG and is therefore a "procedural" question governed by "domestic law." App., *infra*, 3a. Thus, applying the "American rule," the court held that attorneys' fees are not a recoverable form of "loss" under Article 74. As we demonstrate below, this reasoning is fundamentally flawed.

To begin with, the Seventh Circuit erred in holding that the recoverability of attorneys' fees under Article 74 is not "expressly settled" by the CISG. Article 74 broadly provides for the recovery of *all* foreseeable "loss[es]," "using simple, non-nation specific language." *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*, 2002 WL 465312, *3 (S.D.N.Y. Mar. 26, 2002). As the Austria Supreme Court has held, "[u]nder the second sentence of Art. 74, a claim for damages is *only* limited by the foreseeability of the loss for the party in breach." Case No. 1 Ob 292/99v (Apr. 28, 2000) (emphasis added). Accord *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1030 (2d Cir. 1995) (holding that Article 74 "provides that a contract plaintiff may collect damages to compensate for the full loss," "subject *only* to the familiar

limitation that the breaching party must have foreseen, or should have foreseen, the loss as a probable consequence") (emphasis added). As the Seventh Circuit itself acknowledged, nothing in the text or history of Article 74 suggests that attorneys' fees or any other category of loss is excluded from its scope. See Vanto, 15 PACE INT'L L. REV. (while Article 74 does not mention attorneys' fees, "it does not rule out attorneys' fees as damages either").

While attorneys' fees are not specifically mentioned in Article 74, this omission is meaningless because Article 74

> does not expressly mention *any* category of loss — apart from "loss of profit." The nature of the provision in Article 74 CISG is inclusive, not exhaustive. Furthermore, the voluminous case law on Article 74 documents the fact that there are many different categories of loss recoverable as damages, none of which is specifically mentioned in the text of Article 74. Thus, it is questionable whether it is proper for a court to single out one non-specific mention of a category of loss (in this case, "attorneys' fees") when the general approach of Article 74 CISG is not to specifically mention any of the categories of loss encompassed by its express language.

Felemegas, 15 PACE INT'L L. REV. Thus, Article 74 addresses attorneys' fees as a foreseeable form of loss as explicitly as it addresses any other type of loss.

The Seventh Circuit's holding that the recoverability of attorneys' fees under Article 74 is not "expressly settled" within the meaning of CISG Article 7 also makes no sense because the question turns entirely on the meaning of a word used in the Convention itself, *i.e.*, "loss." Regardless of any ambiguity in its meaning (and there is none), the definition of such an express term cannot possibly be regarded as falling outside the scope of the Convention. After all, how can it be that the meaning of a Convention term could be governed by the divergent domestic

laws of each signatory nation? Article 74 would have 62 different meanings, and it would be impossible to achieve any "uniform" understanding of its scope—as the CISG requires.

The question here is *not* whether attorneys' fees are automatically recoverable as a "procedural" matter.[7] No one is suggesting that Article 74 is a fee-shifting statute. The question is whether attorneys' fees qualify as a recoverable form as *damages* where the foreseeability requirements of Article 74 are met. There can only be one uniform answer to that question, and it was incumbent upon the court of appeals to find that answer based on the text and principles of the Convention—not by resorting to local law. Indeed, "even where the inevitable substantive gaps appear, article 7(2) directs an adjudicator to seek answers on an international level, specifically in the values reflected in the convention itself." Van Alstine, at 733.

The Seventh Circuit also erroneously declared that "there are no 'principles' that can be drawn out of the provisions of the Convention for determining whether 'loss' includes attorneys' fees." App., *infra*, 3a. To the contrary,

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[7] The court of appeals also justified its reliance on domestic law by arguing that the recoverability of attorneys' fees is a "procedural" question. In fact, this Court has held at least twice that under federal law the recoverability of attorneys' fees is a *substantive* question. See *Alyeska Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975) (right to attorneys' fees is a "substantive" question for *Erie* purposes); *Chambers v. NASCO*, 501 U.S. 32, 53 (1991) (same). Moreover, the mere characterization of a question as "procedural" does not justify the application of domestic law to matters falling within the scope of the CISG. See Felemegas, 6 VINDOBONA J. INT'L COMM. L. & ARB. at 39 (treating the recovery of attorneys' fees under Article 74 as "a procedural issue to be settled by reference to either the *lex fori* or the otherwise applicable domestic law * * * goes against the plain meaning of the Convention's language and intent, as well as the available international jurisprudence"); Vanto, 15 PACE INT'L L. REV. ("If we * * * approach the matter in the context of the CISG, does it really matter if a national law calls an issue 'procedural' or 'material'* * *?").

> [b]y anybody's account, the "general principles" on which the Convention is based invoke broad concepts such as the requirement to interpret the Convention in "good faith" and to generally act "reasonabl[y]." In the context of the international character of the Convention, "good faith" mandates an interpretation that takes account of non-U.S. principles and interpretations developed by the other Contracting States to the Convention.

Cook, at 261. In this case, the decisions of other Contracting States consistently lead to the conclusion that foreseeable attorneys' fees are recoverable under Article 74. *Supra*, pp. 10-11 & n.5.

Moreover, the recoverability of attorneys' fees under Article 74 "is in accord with one of the most fundamental general principles upon which the Convention is based: *full compensation*." Felemegas, 15 PACE INT'L L. REV. (emphasis in original). Indeed, it is widely recognized that under Article 74, a plaintiff is entitled to recover its "full loss" in order to "place the aggrieved party in as good a position as if the other party had properly performed the contract." *Delchi*, 71 F.3d at 1029, 1030 (quoting Honnold, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 503 (2d ed. 1991)).[8]

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[8] Accord Schlechtriem, COMMENTARY 558 (Article 74 "does not define in more detail which are the losses for which compensation can be obtained. In order to identify the losses for which compensation may be demanded, regard must be had to the principle of full compensation for loss * * * in the context of the particular contract concerned"); UNCITRAL Secretariat Commentary to the 1978 Draft of the CISG, Comment No. 8 (endorsing "[t]he principle of recovery of the full amount of damages suffered by the party not in breach," subject only to the "important limitation" that the amount recovered "may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract"); Principles of International Commercial Contracts of the International Institute for the Unification of Private Law (UNIDROIT),

The district court below properly took these general principles into account, as Article 7 requires, in holding that one of the fundamental principles of the CISG is "to provide full relief" and "make whole" those aggrieved by contractual breaches, and that such "full compensation" can be "assured *only* by freeing [a plaintiff's] damages recovery from the burden of attorneys' fees." App., *infra*, 17a (emphasis in original). But despite the district court's reliance on these general principles and their wide acceptance among other courts, the Seventh Circuit again ignored them. This too was reversible error.

Construing "loss" in Article 74 to include attorneys' fees also advances the CISG's stated goal of promoting "good faith" in international trade by discouraging the sort of brazen contractual breaches that occurred here, and by also ensuring that the costs of litigation do not discourage non-breaching parties from asserting their rights.

In sum, the district court's award of Zapata's attorneys' fees as a recoverable "loss" easily comports with the plain language of Article 74, particularly given the parties' stipulation that those fees and expenses were foreseeable to Lenell at the time of contracting. The Seventh Circuit's reversal of that ruling reflects a fundamental misapplication of the CISG and its text.

C. Supreme Court Guidance Over The Proper Application Of The CISG Is Vital.

There is great confusion over the interpretive standards that courts must apply in construing the CISG. "Unfortunately, the guidance from the Supreme Court has been cryptic on this score." Van Alstine, at 709. "The consequence has been an application of divergent substantive norms precisely in the manner the adoption of the [CISG] was designed to prevent." *Id.* at 767. The Seventh Circuit's decision typifies this trend, prompting requests for Supreme Court review to "provide the

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Article 7.4.2 ("[t]he aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance").

appropriate jurisprudential leadership and sound doctrinal clarity necessary for the proper interpretation and application of the Convention's provisions." Felemegas, 15 PACE INT'L L. REV.

The need for Supreme Court review is compelling not only to resolve the conflict over the meaning of Article 74, but also more generally to clarify the interpretative rules that courts must follow in applying the CISG, including the determination of when a "gap" exists within the meaning of Article 7, and the extent to which domestic law may be used to fill such gaps.

In the meantime, the Seventh Circuit's message to other CISG signatory nations is clear—that U.S. courts will continue to rely on rules of local law to interpret the CISG. Indeed, foreign authorities have lamented the Seventh Circuit's "disappointing" decision as revealing the "reflexes of the American judges," and for displaying the "symptoms associated with a narrow, national and, therefore, improper interpretation of the provisions of the Convention" by "trying to fit the body of law that is the CISG onto the bed that is American legal heritage which, by design, does not fit." Felemegas, 15 PACE INT'L L. REV. As other U.S. courts regrettably have done, the Seventh Circuit "consulted exclusively U.S. decisions and U.S. commentators. In its approach, no international trace, such as non-U.S. sources or methods of analysis, can be found anywhere." Cook, at 261.

Without Supreme Court intervention, "[t]he process of building a common international framework for understanding contracts, and thus escaping the pull of the 'homeward trend,' is * * * likely to be a long and difficult one." Flechtner, 17 J.L. & COMM. at 200, 204 (citing Honnold, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989)). Immediate intervention is therefore vital, for "[i]t is of utmost importance to the viability of the Convention that national concepts and labels do not hamper the uniformity that is critical for the functioning of the Convention and the

certainty that is crucial to the functioning of international trade." Vanto, 15 PACE INT'L L. REV.

Allowing the meaning of terms used in the CISG to be controlled by domestic law will have serious practical consequences. For instance, it will lead to forum shopping by encouraging parties to file suit in countries whose domestic law puts an expansive cast on Article 74. Defendants sued in U.S. courts also would have exclusive immunity against the payment of attorneys' fees as damages since the U.S. is the only CISG signatory to recognize the "American rule," thus encouraging breaching U.S. parties like Lenell to engage in precisely the sort of bad faith conduct that the CISG was meant to discourage.

The Seventh Circuit's reading of the CISG also makes it more difficult for parties to contract internationally by making it tougher to discern the CISG's default rules. "Article 6 guarantees party autonomy over both the conflict rules and the substantive law"; thus, "any rule of the Convention can be altered or rejected by the parties, even by standard contract terms." Schlechtriem, UNIFORM SALES LAW at 35. Thus, for instance, if parties wish to agree that each will bear its own attorneys' fees and expenses in any litigation, they are free to do so. "The underlying idea is that the parties, at the conclusion of the contract, should be able to calculate the risks and potential liability they assume by their agreement." *Id.*, 97. Such bargains are only possible, however, if the parties have a common understanding of the default rules against which they are contracting. Otherwise, the "CISG will be but a pitfall for the unwary." Behr, *The Sales Convention in Europe: From Problems in Drafting to Problems in Practice*, 17 J.L. & COMM. 263, 265-66 (1998). As this Court warned in *Scherk*, 417 U.S. at 516-17, "the dicey atmosphere of such a legal no-man's land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."

The Court should grant the petition to resolve these important questions and bring needed clarity to this vital area of private international law.

II. THE SEVENTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT LACKED THE INHERENT POWER TO SANCTION LENELL'S BAD FAITH CONDUCT CONFLICTS WITH THIS COURT'S DECISION IN *CHAMBERS v. NASCO*, 501 U.S. 32 (1991), AND DECISIONS OF OTHER CIRCUITS.

A. The Circuits Are Deadlocked Over Whether Federal Courts Have The Inherent Power To Sanction Bad Faith Conduct That Is Otherwise Sanctionable By Statute Or Rule.

The Seventh Circuit's decision also raises the important and recurring question of whether a federal court may sanction, pursuant to its inherent power, a party for bad faith conduct even if such conduct is sanctionable under statutory or rules-based mechanisms. The need for Supreme Court review of this important issue is also compelling, as it has continuously recurred and deeply divided the Circuits. This case provides an ideal opportunity to put this controversy to rest as well.

In *Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991), this Court held that "a court may assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons,'" when a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled," or when a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order." In such cases, "[t]he imposition of sanctions * * * transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of 'vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy.'" *Id.*

Chambers also held that a federal court is *not* "forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules," and that "requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves." 501 U.S. at 50-51. The Court also noted, however, that while federal courts "ordinarily" should proceed under other rules or statutes where they are adequate, inherent power may be "safely" invoked "if in the informed discretion of the court, neither the statute nor the Rules are up to the task." *Id.* at 50.

The Circuits are hopelessly divided over the meaning of *Chambers* and the extent to which federal courts have the inherent power to sanction parties for bad faith conduct even if such conduct is potentially sanctionable by statute or rule.

In this case, the Seventh Circuit held that courts may *not* invoke their inherent power to sanction bad faith conduct unless such conduct cannot be "adequately dealt with by other rules, most pertinently here Rules 11 and 37 of the Federal Rules of Civil Procedure." The court also held that the procedural "limitations" of Rules 11 and 37 "are equally limitations on inherent authority" imposition of such sanctions. App., *infra*, 7a, 9a. This holding is consistent with rulings of the First and Third Circuits, which also have held that inherent power sanctions may only be imposed where a court finds that other sanctioning mechanisms are not "up to the task." See, *e.g.*, *United States v. One 1987 BMW 325*, 985 F.2d 655, 661 (1st Cir. 1993) ("When, as in this case, the Civil Rules limit the nature of the sanction that can be imposed, a court may not use its inherent powers to circumvent the Rules' specific provisions"); *Klein v. Stahl GMBH & Co.*, 185 F.3d 98, 108 (3d Cir. 1999) ("a trial court should consider invoking its inherent sanctioning powers only where no sanction established by the

Federal Rules or a pertinent statute is 'up to the task' of remedying the damage done by a litigant's malfeasance"); *Montrose Med. Group Sav. Plan v. Bulger*, 243 F.3d 773, 785 (3d Cir. 2001) (reversing for failure to consider rule- or statute-based sanctions before invoking inherent power).

The Seventh Circuit's holding irreconcilably conflicts, however, with those of the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh and Federal Circuits, which all have squarely held that federal courts *may* invoke their inherent power to sanction bad faith conduct *regardless* of whether such conduct is also sanctionable under statutes or rules. See, *e.g.*, *DLC Mgt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 136 (2d Cir. 1998) (affirming inherent power sanction, and holding that "the fact that there may be a statute or rule which provides a mechanism for imposing sanctions of a particular variety for a specific type of abuse does not limit a court's inherent power to fashion sanctions, even in situations similar or identical to those contemplated by the statute or rule"); *In re Weiss*, 111 F.3d 1159, 1171 (4th Cir. 1997) ("A court may invoke its inherent power in conjunction with, or instead of, other sanctioning provisions such as [Bankruptcy] Rule 9011"); *Travelers Ins. Co. v. St. Jude Hosp.*, 38 F.3d 1414, 1418 (5th Cir. 1994) ("a court is not forbidden from sanctioning bad-faith conduct under its inherent powers simply because that conduct could also be sanctioned under § 1927 or the Federal Rules of Civil Procedure") (citing *Chambers*); *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 514 (6th Cir. 2002) ("In our view, *Chambers* should be read broadly to permit the district court to resort to its inherent authority to sanction bad-faith conduct, even if the court has not expressly considered whether such conduct could be sanctioned under all potentially applicable rules or statutes"); *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 594 n.2 (8th Cir. 2001) ("the sanctioning provisions of Rule 16 and the district court's inherent power to sanction are not mutually exclusive. In *Chambers* * * * the Court rejected the appellant's contention

that the sanctioning provisions in the federal rules reflect a legislative intent to replace or foreclose resort to the courts' inherent power"); *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001) ("It is well settled * * * that the district court may, in its informed discretion, rely on inherent power rather than the federal rules or § 1927"); *RTC v. Dabney*, 73 F.3d 262, 267 (10th Cir. 1995) (same); *Thomas v. Tenneco Packaging*, 293 F.3d 1306, 1328 n.32 (11th Cir. 2002) ("as an alternative to a district court's inherent power, several federal provisions provide possible avenues for imposing sanctions upon errant attorneys who harass other attorneys during the course of litigation.* * * That sanctions may have been possible under these provisions, however, did not negate the district court's inherent power to levy sanctions against Munson for her misconduct"); *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir. 1995) ("the 'inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct,' for these rules are not substitutes for the inherent power") (quoting *Chambers*); *Pickholtz v. Rainbow Tech.*, 284 F.3d 1365, 1376-77 (Fed. Cir. 2002) ("express rules supplement, rather than displace, the court's inherent power. * * * *Chambers* thus permits, indeed requires, the court to separately consider Pickholtz's motion for attorney fees under its inherent power").

Courts on both sides of this split purport to find support for their position in *Chambers*. On the one hand, *Chambers* emphasized that a federal court is not "forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules," and refused to "requir[e] a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct." On the other hand, the Court noted that "ordinarily" a court should rely on statutory or rules-based sanctioning mechanisms unless the court determines that "neither the statute nor the Rules are up to the task." 501 U.S. at 50-51. As the sheer magnitude and

frequency of this circuit split confirm, the federal courts have not been able to reach a consensus over the meaning of *Chambers*, and have no prospect of doing so without this Court's intervention.

B. The Circuits Are Also Split Over Whether Courts Can Consider Pre-Litigation Conduct In Sanctioning Bad Faith Conduct Pursuant To Their Inherent Power.

The Seventh Circuit's decision also squarely implicates a separate circuit split over the meaning of *Chambers*. The court held that the district court reversibly erred in basing its inherent power sanction, in part, on Lenell's pre-litigation conduct—to wit, Lenell's refusal to pay for goods it had ordered, received and used despite the fact that this debt was confirmed by "its own accounting records, and the fact that Lenell had absolutely no defense to payment of invoices totaling $857,796.90," such that Zapata "was forced to sue to collect for the unpaid sale price of its tins." App., *infra*, 19a. According to the Seventh Circuit, a federal court may not exercise its inherent power to sanction conduct "giving rise to the litigation * * * for then the punishment would be a product of substantive law." App., *infra*, 7a. This holding squarely conflicts with decisions of the Fifth, Sixth, Eighth and Ninth Circuits.

For instance, the Eighth Circuit has "adopted the view promulgated by various circuits that, in determining whether to award attorney fees based on the litigant's bad faith, 'the court may consider conduct both during and prior to the litigation, although the award may not be based solely on the conduct that led to the substantive claim.'" *Lamb Eng'g & Constr. Co. v. Nebraska Public Power Dist.*, 103 F.3d 1422, 1435 (1997) (quoting *McLarty v. United States*, 6 F.3d 545, 549 (8th Cir. 1993)). At least four other circuits agree. See, *e.g.*, *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995) ("[w]hile Rule 11 extends only to papers filed with the court, the court's inherent power is broader and would permit the court to impose

sanctions on the basis of related bad-faith conduct prior to the commencement of the litigation"); *Perales v. Casillas*, 950 F.2d 1066, 1071 (5th Cir. 1992) (same); *Ass'n of Flight Attendants v. Horizon Air Indus.*, 976 F.2d 541, 548-50 (9th Cir. 1992) (same); *Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226, 1230, 1234 (6th Cir. 1984) (inherent power to sanction extends to bad faith pre-litigation conduct "necessitating that an action be filed," particularly in "a case where the defendant contumaciously refused to allow the plaintiff what was plainly owed, thus forcing the plaintiff to go to court"). Accord *Hall v. Cole*, 412 U.S. 1, 15 (1973) ("'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation"); *United States ex rel. Yonker Constr. Co. v. Western Contracting Corp.*, 935 F.2d 936, 942 (8th Cir. 1991) ("Bad faith may occur during either contract performance or litigation"). *Cf. Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 765 (10th Cir. 1997) ("an award of attorneys' fees may not be premised solely on prelitigation conduct").

The circuits today regard this as a question left open by *Chambers*. In *Association of Flight Attendants*, for instance, the Ninth Circuit noted that *Chambers* "took care to explain that it was not reaching the issue whether a court had inherent power to sanction a party for bad faith conduct relating to the underlying cause of action—in that case, for breach of contract." 976 F.2d at 548. Accord *Towerridge*, 111 F.3d at 766 (noting that *Chambers* "declined" to reach this question "because that issue was not before it"); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1503 (5th Cir. 1995) (noting that "the *Chambers* majority expressed no opinion on the question of whether a federal court has the inherent power to impose sanctions for conduct giving rise to an underlying claim, rather than for bad-faith conduct during the litigation process"). The Seventh Circuit's decision squarely raises this open question since the district court relied in part on prelitigation misconduct that it found was directly related to Lenell's bad faith conduct in the litigation as well.

The Court should grant the petition to resolve these significant splits of authority, each of which independently warrants Supreme Court review.

C. The District Court Properly Sanctioned Lenell For Bad Faith Litigation Conduct.

The district court sanctioned Lenell pursuant to its inherent power based on detailed findings that Lenell engaged in "extreme bad faith" by misusing the judicial system to avoid paying a debt it knew that it owed. The court specifically found that Lenell carried out this scheme by "dramatically and needlessly expanding the scope of this litigation," and "mak[ing] it as difficult and expensive as possible for Zapata to receive its money in this litigation * * * by interposing a host of unwarranted roadblocks," including "late-advanced, convoluted, multifarious and (regrettably) baseless defenses and counterclaims." App., *infra*, 20a-25a. By these repeated acts of bad faith, the court found that Lenell "dragg[ed] out what should have been a relatively simple collection case for goods sold * * * into an enormously time-consuming and expensive lawsuit," *id.*, 23a, acting as if the judicial system "created a sort of iron curtain that justified Lenell's continued stiffing of its creditor as to the entire amount of a very large outstanding (and to a large extent undisputed) obligation." C.A. App. 11.

These detailed findings—none of which the court of appeals disturbed—amply supported the court's sanction because the cited misconduct pervaded the entire litigation. *Chambers* affirmed just such a sanction, holding that even though "the District Court could have employed Rule 11 to sanction Chambers for filing 'false and frivolous pleadings,' and that some of the other conduct might have been reached through other Rules," the sanction of case-wide attorneys' fees was proper because (as in this case) the defendant's "entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address." 501 U.S. at 50-51.

It is true that Zapata did not seek sanctions under Rules 11 or 37 because Lenell's misconduct could only be confirmed through full discovery and trial, after which it became obvious that Lenell never had any factual or legal basis for asserting its multitude of defenses and counterclaims. But whether Zapata could have sought sanctions under Rules 11 and 37 is beside the point, for the district court's inherent power to sanction Lenell's bad faith conduct was entirely distinct from the sanctioning power granted by Rules 11 and 37.

The "central purpose" of rules-based sanctioning mechanisms like Rule 11 "is to deter baseless filings in district court." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). The inherent power to sanction bad faith conduct, by contrast, "transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of 'vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy.'" *Chambers*, 501 U.S. at 45-46. It is precisely for this reason that a federal court is not "forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules." *Id.* at 50. In this case, however, the Seventh Circuit not only held that inherent power sanctions may only be sought where other sanctioning mechanisms are inadequate, but that the procedural requirements of Rules 11 and 37 apply *equally* to inherent power sanctions. This decision cannot be squared with *Chambers*, and should be reversed.

D. The Court Of Appeals' Decision Raises Recurring Issues Of Great Practical Importance.

The prejudice to petitioner from the splits of authority described above are readily apparent. Had this litigation taken place in any of the eight circuits that do not constrain the courts' inherent sanctioning power, the sanction below would have been affirmed. In addition, it is now impossible for petitioner to

comply with the Seventh Circuit's mandate that petitioner proceed under Rule 11 since Zapata cannot now satisfy the Rule's safe harbor provisions. See Fed. R. Civ. P. 11.

Beyond the contours of this case, the question of whether a federal court may exercise its inherent power to sanction bad faith litigation conduct that is potentially sanctionable under other mechanisms is one of great practical significance. The relationship between the inherent power doctrine and statutory or rules-based sanctions must be clearly defined for other pending and future cases so that parties aggrieved by bad faith conduct can confidently assess their options for seeking redress.

From the sheer number of cases that have recently addressed this issue, it is also apparent that absent Supreme Court review, this question will continue to plague the federal courts. This case provides an ideal opportunity to resolve these important controversies. The Court should grant the petition, and reverse the decision of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 01-3402, 02-1867, 02-1915

ZAPATA HERMANOS SUCESORES, S.A.,

Plaintiff-Appellee,

v.

HEARTHSIDE BAKING COMPANY, INC.,
D/B/A MAURICE LENELL COOKY COMPANY,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 4040—Milton I. Shadur, *Judge*.

ARGUED SEPTEMBER 13, 2002—DECIDED NOVEMBER 19, 2002

Before POSNER, DIANE P. WOOD, and EVANS, Circuit Judges.

POSNER, *Circuit Judge*. Zapata, a Mexican corporation that supplied Lenell, a U.S. wholesale baker of cookies, with cookie tins, sued Lenell for breach of contract and won. The district judge ordered Lenell to pay Zapata $550,000 in attorneys' fees. From that order, which the judge based both on a provision of the Convention on Contracts for the International Sale of Goods, Jan. 1, 1988, 15 U.S.C. App., and on the inherent authority of the courts to punish the conduct of litigation in bad faith, Lenell appeals.

The Convention, of which both the U.S. and Mexico are signatories, provides, as its name indicates, remedies for breach of international contracts for the sale of goods. Zapata brought suit under the Convention for money due under 110 invoices, amounting to some $900,000 (we round liberally), and also sought prejudgment interest plus attorneys' fees, which it contended are "losses" within the meaning of the Convention and are therefore an automatic entitlement of a plaintiff who prevails in a suit under the Convention. At the close of the evidence in a one-week trial, the judge granted judgment as a matter of law for Zapata on 93 of the 110 invoices, totaling $850,000. Zapata's claim for money due under the remaining invoices was submitted to the jury, which found in favor of Lenell. Lenell had filed several counterclaims; the judge dismissed some of them and the jury ruled for Zapata on the others. The jury also awarded Zapata $350,000 in prejudgment interest with respect to the 93 invoices with respect to which Zapata had prevailed, and the judge then tacked on the attorneys' fees—the entire attorneys' fees that Zapata had incurred during the litigation.

Article 74 of the Convention provides that "damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach," provided the consequence was foreseeable at the time the contract was made. Article 7(2) provides that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law [i.e., conflicts of law rules]." There is no suggestion in the background of the Convention or the cases under it that "loss" was intended to include attorneys' fees, but no suggestion to the contrary either. Nevertheless it seems apparent that "loss" does not include attorneys' fees incurred in the litigation of a suit for breach of contract, though certain prelitigation legal

expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as "incidental"damages. *Sorenson v. Fio Rito*, 413 N.E.2d 47, 50-52 (Ill. App. 1980); cf. *Tull v. Gundersons, Inc.*, 709 P.2d 940, 946 (Colo. 1985); *Restatement (Second) of Contracts* § 347, comment c (1981).

The Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law. For example, the "American rule," that the winner must bear his own litigation expenses, and the "English rule" (followed in most other countries as well), that he is entitled to reimbursement, are rules of general applicability. They are not field-specific. There are, however, numerous exceptions to the principle that provisions regarding attorneys' fees are part of general procedure law. For example, federal antidiscrimination, antitrust, copyright, pension, and securities laws all contain field-specific provisions modifying the American rule (as do many other field-specific statutes). An international convention on contract law *could* do the same. But not only is the question of attorneys' fees not "expressly settled" in the Convention, it is not even mentioned. And there are no "principles" that can be drawn out of the provisions of the Convention for determining whether "loss" includes attorneys' fees; so by the terms of the Convention itself the matter must be left to domestic law (i.e., the law picked out by "the rules of private international law," which means the rules governing choice of law in international legal disputes).

U.S. contract law is different from, say, French contract law, and the general U.S. rule on attorneys' fee shifting (the "American rule") is different from the French rule (loser pays). But no one would say that French contract law differs from U.S. *because* the winner of a contract suit in France is entitled to be reimbursed by the loser, and in the U.S. not. That's an

important difference but not a contract-law difference. It is a difference resulting from differing procedural rules of general applicability.

The interpretation of "loss" for which Zapata contends would produce anomalies, which is another reason to reject the interpretation. On Zapata's view the prevailing plaintiff in a suit under the Convention would (though presumably subject to the general contract duty to mitigate damages, to which we referred earlier) get his attorneys' fees reimbursed more or less automatically (the reason for the "more or less" qualification will become evident in a moment). But what if the defendant won? Could he invoke the domestic law, if as is likely other than in the United States that law entitled either side that wins to reimbursement of his fees by the loser? Well, if so, could the plaintiff waive his right to attorneys' fees under the Convention in favor of domestic law, which might be more or less generous than Article 74, since Article 74 requires that any loss must, to be recoverable, be foreseeable, which beyond some level attorneys' fees, though reasonable ex post, might not be? And how likely is it that the United States would have signed the Convention had it thought that in doing so it was abandoning the hallowed American rule? To the vast majority of the signatories of the Convention, being nations in which loser pays is the rule anyway, the question whether "loss" includes attorneys' fees would have held little interest; there is no reason to suppose they thought about the question at all.

For these reasons, we conclude that "loss" in Article 74 does not include attorneys' fees, and we move on to the question of a district court's inherent authority to punish a litigant or the litigant's lawyers for litigating in bad faith. The district judge made clear that he was basing his award of attorneys' fees to Zapata in part on his indignation at Lenell's having failed to pay money conceded to be owed to Zapata. Although the precise amount was in dispute, Lenell concedes that it owed Zapata at least half of the $1.2 million that Zapata

obtained in damages (not counting the attorneys' fees) and prejudgment interest. Lenell had no excuse for not paying that amount, and this upset the judge.

Firms should pay their debts when they have no legal defense to them. *Pacta sunt servanda*, as the saying goes ("contracts are to be obeyed"). In the civil law (that is, the legal regime of Continental Europe), this principle is taken very seriously, as illustrated by the fact that the civil law grants specific performance in breach of contract cases as a matter of course. But under the common law (including the common law of Illinois, which is the law that choice of law principles make applicable in this case to any issues not covered in express terms by the Convention), a breach of contract is not considered wrongful activity in the sense that a tort or a crime is wrongful. When we delve for reasons, we encounter Holmes's argument that practically speaking the duty created by a contract is really just to perform or pay damages, for only if damages are inadequate relief in the particular circumstances of the case will specific performance be ordered. In other words, and subject to the qualification just mentioned, the entire practical effect of signing a contract is that by doing so one obtains an option to break it. The damages one must pay for breaking the contract are simply the price if the option is exercised. See Oliver Wendell Holmes, Jr., *The Common Law* 300-02 (1881); Holmes, "*The Path of the Law,*" 10 *Harv. L. Rev.* 457, 462 (1897).

Why such lenity? Perhaps because breach of contract is a form of strict liability. Many breaches are involuntary and so inapt occasions for punishment. Even deliberate breaches are not necessarily culpable, as they may enable an improvement in efficiency—suppose Lenell had a contract to take a certain quantity of tins from Zapata and found that it could buy them for half the price from someone else. Some breaches of contract, it is true, are not only deliberate but culpable, and maybe this was one—Lenell offers no excuse for failing to pay

for tins that it had taken delivery of and presumably resold with its cookies in them. Refusing to pay the contract price after the other party has performed is not the kind of option that the performing party would willingly have granted when the contract was negotiated. The option of which Holmes spoke was the option not to perform because performance was impossible or because some more valuable use of the resources required for performance arose after the contract was signed. Zapata argues, moreover, perhaps correctly (we need not decide), that Lenell refused to pay in an effort to extract a favorable modification of the terms of the parties' dealings, which would be a form of duress if Zapata somehow lacked an effective legal remedy. *Professional Service Network, Inc. v. American Alliance Holding Co.*, 238 F.3d 897, 900-01 (7th Cir. 2001); *Alaska Packers' Ass'n v. Domenico*, 117 Fed. 99, 100-04 (9th Cir. 1902). But Zapata did not charge duress, and probably couldn't, since it had a good remedy—this suit.

It is true that nowadays common law courts will sometimes award punitive damages for breach of contract in bad faith. But outside the field of insurance, where refusals in bad faith to indemnify or defend have long been punishable by awards of punitive damages to the insured, the plaintiff must show that the breach of contract involved tortious misconduct, such as duress or fraud or abuse of fiduciary duty. See, e.g., *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 982-83 (Ind. 1993); *Story v. City of Bozeman*, 791 P.2d 767, 776 (Mont. 1990); E. Allan Farnsworth, *Contracts* § 12.8, pp. 788-89 (3d ed. 1999). This is the rule in Illinois, *Morrow v. L.A. Goldschmidt Associates, Inc.*, 492 N.E.2d 181, 183-86 (Ill. 1986), and Zapata has not tried to come within it. For that matter, it did not ask for punitive damages, and the judge had no authority to award attorneys' fees in lieu of such damages. He could not have awarded punitive damages if Zapata had asked for them but had been unable to prove tortious misconduct by Lenell, and even more clearly he could not award them when they had not been requested.

The decision whether punitive damages shall be a sanction for a breach of contract is an issue of substantive law, and under the *Erie* doctrine a federal court is not authorized to apply a different substantive law of contracts in a diversity case from the law that a state court would apply were the case being litigated in a state court instead. And obviously that rule must not be circumvented by renaming punitive damages "attorneys' fees." *United States ex rel. Treat Bros. Co. v. Fidelity & Deposit Co. of Maryland*, 986 F.2d 1110, 1119-20 (7th Cir. 1993); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52-55 (1991); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.*, 976 F.2d 541, 548-50 (9th Cir. 1992). It is true that this is not a diversity case, but the *Erie* doctrine applies to any case in which state law supplies the rule of decision, see, e.g., *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83-85, 87-88 (1994), here by incorporation in the Convention.

The inherent authority of federal courts to punish misconduct before them is not a grant of authority to do good, rectify shortcomings of the common law (as by using an award of attorneys' fees to make up for an absence that the judge may deem regrettable of punitive damages for certain breaches of contract), or undermine the American rule on the award of attorneys' fees to the prevailing party in the absence of statute. *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1318 (10th Cir. 2000); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.*, *supra*, 976 F.2d at 548-50 (9th Cir. 1992); *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226, 1232-33 and n. 9 (6th Cir. 1984) (en banc). These cases and others we could cite make clear that it is a residual authority, to be exercised sparingly, to punish misconduct (1) occurring in the litigation itself, not in the events giving rise to the litigation (for then the punishment would be a product of substantive law—designed, for example, to deter breaches of contract), and (2) not adequately dealt with by other rules, most pertinently here Rules 11 and 37 of the

Federal Rules of Civil Procedure, which Lenell has not been accused of violating.

Insofar as he focused on Lenell's behavior in the litigation itself, which, to repeat, is the only lawful domain of the relevant concept of "inherent authority"—the authority could not constitutionally be extended to give parties remedies not available to them under the law of the state that furnishes the substantive rules of decision in the case—the judge punished Lenell for having failed to acknowledge liability and spare Zapata and the judge and the jury and the witnesses and so on the burden of a trial. But as it happens, the fault here was in no small measure the judge's. Well before the trial, and long, long before Zapata's lawyers had run the tab up to $550,000, they had moved for partial summary judgment, claiming that Lenell in answer to Zapata's requests for admission had acknowledged liability for $858,000 of the $890,000 sought in the complaint. The judge had denied the motion on the ground that partial summary judgment cannot be granted unless the grant would give rise to an appealable judgment. This was error. Rule 56(d) of the civil rules is explicit in allowing the judge to grant summary judgment on less than the plaintiff's whole claim, and there is no hint of any requirement that the grant carve at a joint that would permit the judge to enter a final judgment under Rule 54(b). If the plaintiff had two separate claims, and the judge granted summary judgment on one and set the other for trial, he could also if he wanted enter final judgment on the first dismissal, enabling the defendant to appeal immediately under Rule 54(b). If instead the plaintiff had as here one claim, and the judge granted it in part, the defendant could not appeal—the conditions of Rule 54(b) would not be satisfied—yet it is evident from the wording of Rule 56(d) that this would be a proper partial summary judgment, for the rule expressly authorizes an order "specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy." No purpose would be served by confining the rule as the district

judge did. If anything, judicial economy is better served by a partial summary judgment that is *not* appealable, since a Rule 54(b) appeal normally interrupts the proceedings in the district court.

Since the challenged award of $550,000 in attorneys' fees cannot stand, we need not pick through the record to see whether some of the counterclaims or other moves by Lenell during the trial were sanctionable apart from Rule 11 and Rule 37. But it may be useful by way of guiding further proceedings on remand to point out that to the extent that those rules place limits on the award of sanctions under them (for example by the provision of safe harbors in Rule 11), those limitations are equally limitations on inherent authority, which may not be used to amend the rules. *Kovilic Construction Co. v. Missbrenner*, 106 F.3d 768, 772-73 (7th Cir. 1997). For federal rules of procedure have the force of statutes. See *id.*; 28 U.S.C. § 2072(b).

One issue remains for discussion. Although we have treated the appeal so far as if the only issues concerned attorneys' fees, Lenell also argues that the jury verdict should be set aside because the judge by his comments in open court signaled to the jury his scorn for Lenell's case. There were only a couple of such comments (many more, however, at sidebars outside the jury's hearing), and we do not think they could have changed the outcome. But we also think that judges should be very cautious about making comments in the hearing of a jury about the quality of a party's case or lawyers. For if he signals to the jury the judge's opinion as to how the case should be decided, he undermines the authority of the jury. *Collins v. Kibort*, 143 F.3d 331, 336 (7th Cir. 1998); *Nationwide Mutual Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 805, 808 (6th Cir. 1999); see also *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1187 (7th Cir. 1992).

From what we have just reported about the judge's statements during the trial and from the tone of a number of

other statements that he made in the course of this litigation, we think it best that the further proceedings that we are ordering be conducted before a different judge, in accordance with 7th Cir. R. 36.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ZAPATA HERMANOS SUCESORES, S.A., *Plaintiff*,
v.
HEARTHSIDE BAKING CO., INC., etc., *Defendant*.

No. 99 C 4040.

Aug. 29, 2001.

MEMORANDUM OPINION AND ORDER

SHADUR, Senior District J.

After having prevailed in principal part before the jury that heard the litigants' major commercial dispute, Zapata Hermanos Sucesores, S.A. ("Zapata") has moved for an award of attorneys' fees on three alternative grounds, two of them advanced against defendant Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Co. ("Lenell") and the third advanced against Lenell's litigation counsel, Gordon & Centracchio, L.L.C. ("Law Firm"). This Court's August 22, 2001 memorandum opinion and order dealt with Zapata's motion against the Law Firm. Now the issues as between Zapata and Lenell have become fully briefed, and this memorandum opinion and order resolves that claim in favor of Zapata and against Lenell.

In an unsuccessful effort to "make the worse appear the better reason,"[1] Lenell's counsel lay heavy stress on the facts that Zapata has sued Lenell in a United States court and that the

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[1] John Milton, *Paradise Lost*, bk. II, ll. 113-14, likely drawn from Diogenes Laertius, *Socrates* 5.

well-known "American Rule" calls for litigants to bear their own legal expense. But in so doing, Lenell's counsel present their arguments in a way that impermissibly seeks to draw attention away from an exception that is built into the American Rule itself[2]--an exception that their Mem. 2 itself quotes from *F.D. Rich Co. v. United States f/u/o Industrial Lumber Co.*, 417 U.S. 116, 126 (1974) (internal quotation marks and citation omitted, but with appropriate emphasis added):

> The so-called "American Rule" governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees are not ordinarily recoverable *in the absence of a statute or enforceable contract providing therefor*.

Accord, such cases as *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975).

There is a reason of course that the doctrine on which Lenell seeks to rely is called the American Rule: This country is in the minority of commercial jurisdictions that do *not* make prevailing parties truly whole by saddling their adversaries with the winners' legal expenses--an omission that does not (as does the vast majority of other jurisdictions' fee-shifting approach) put the winners in contract disputes into the same economic position as if the breaching parties had performed their required obligations under the contracts (see John Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L LAW 1, 6-7 & nn. 20, 27 (1999) (reviewing identical principles applicable to litigation as well as arbitration); John Gotanda, SUPPLEMENTAL DAMAGES IN PRIVATE INTERNATIONAL LAW 146-73 (1998) (confirming those principles applicable in litigation)). In this instance two

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[2] As this opinion explains, that sleight-of-hand effort--better suited to a shell game along the midway of a state fair than to a legal memorandum--serves to obscure the true simplicity of the current inquiry

stipulations in which Lenell has joined bury its efforts to escape liability via the American Rule:

1. Both sides have agreed all along that their claims and counterclaims are governed by a treaty to which the United States is a signatory, the Convention on the International Sale of Goods ("Convention"). And here is the controlling provision of Convention Art. 74 ("Article 74") (emphasis added):

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party *as a consequence of the breach.* Such damages may not exceed the loss which the party in breach *foresaw or ought to have foreseen* at the time of the conclusion of the contract, in light of the facts and matters of which he then knew or ought to have known, *as a possible consequence of the breach of contract.*

2. Before trial the litigants entered into a June 8, 2001 Stipulation that provided in relevant part (again with emphasis added):

1. As of the dates when Lenell issued its purchase orders for the tins described in the invoices attached as Group Exhibit A to Zapata's Complaint in this case, *Lenell foresaw or should have foreseen that if Lenell failed to pay for the tins that it ordered, received and accepted, Zapata would incur litigation costs including attorneys fees, to seek payment of the invoices for said tins.*

2. The Court shall determine if attorney's fees are recoverable as a matter of law.

3. The amount of litigation costs, including attorneys' fees, to be assessed as consequential damages

> in this case, if any, will be for the Court to determine on a fee petition, rather than for the jury to decide.

There is no room to question the source of law to which this Court is to look to make the determination called for by the last-quoted Stipulation. With the Convention--a treaty--controlling the relationship between Mexican seller Zapata and United States purchaser Lenell, this Court has been called upon to exercise subject matter jurisdiction over Zapata's successful substantive claim in federal question terms. That of course calls into play federal choice-of-law principles rather than those of any state such as Illinois (see, e.g., *RTC v. Chapman*, 29 F.3d 1120, 1124 (7th Cir. 1994), citing the seminal decision in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 318 U.S. 487 (1941)). And relatedly, before trial Zapata dropped its alternative state law account-stated claim, which could perhaps have called diversity or supplemental jurisdiction (and thus local choice-of-law principles) into play as to that claim.

In that respect the existence or nonexistence of a fee-shifting rule is one of substantive policy (*Alyeska Pipeline*, 421 U.S. at 259 n.31; contrast *Midwest Grain Prods. of Ill., Inc. v. Productization, Inc.*, 228 F.3d 784, 787 (7th Cir. 2000), a diversity case on which Lenell unpersuasively seeks to rely). And a treaty, occupying international scope as it does and (as in this case) defining the relationships between nationals of different signatory countries, calls for uniformity of construction. Although written about a different provision of the Convention, the analysis in *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.F.A.*, 144 F.3d 1384, 1391 (11th Cir. 1998) applies with equal force to mandate universality rather than a purely home-town rule as to the awardability of attorneys' fees under the Convention:

> One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty

> as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply. *See* Letter of Transmittal from Ronald Reagan, President of the United States, to the United States Senate, *reprinted at* 15 U.S.C. app. 70, 71 (1997). Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.

It is therefore wholly misleading for Lenell to contend as it does for the parochial application of the American Rule (as by attempting to call *Midwest Grain* to its aid). Although the norm in our own judicial system is for each litigant in a purely United-States-based dispute to bear the burden of its own legal expense, that does not at all equate to the notion that public policy (or anything else) forbids a federal court's judicial enforcement of a different rule that is appropriately brought into play--indeed, the earlier-quoted language from *F.D. Rich* expressly contemplates such enforcement where there is a statute (and a treaty calls for an a fortiori application of that notion) that instead establishes a "loser pays" regime.

It surely cannot be said that Zapata opted for the application of Illinois substantive law (or for the American Rule as such) just by having sued Lenell in a jurisdiction that did not pose serious problems of the nature that would have been generated by an attempt to sue at Zapata's own home base in Mexico--that is, by selecting a forum where Lenell could not assert any otherwise available challenge to in personam jurisdiction and where a favorable judgment for Zapata would be directly enforceable and capable of execution. And when purely parochial considerations are put aside (quite properly so), it

cannot be gainsaid that the normal unstrained reading of Article 74 coupled with the above-quoted Stipulation calls for Zapata's recovery of its attorneys' fees as foreseen consequential damages.

When the searchlight of analysis is thus properly focused on the language of the Convention without any inappropriate overlay from the American Rule, the question becomes a simple one. As n.2 has said, it truly smacks of a shell game for Lenell to have entered into the commitments to which it has stipulated and yet to urge that Zapata's admittedly foreseeable legal expense ("which the party in breach [Lenell] foresaw or ought to have foreseen," in the language of Article 74) was not "suffered by the other party [Zapata] as a consequence of the breach" (again the language of Article 74). It is totally unpersuasive for Lenell's counsel to contend instead that those commitments and Lenell's admissions do not equate to saying that attorneys' fees are "consequential damages" recoverable under the Convention.[3]

That distorted reading of the language is clearly refuted by the decisions cited at Zapata Mem. 4 from other countries' courts and arbitral tribunals. Obviously unable to counter directly, Lenell attempts to draw an inference from cases that decide the applicable *interest rate* under the Convention--not the right to the *payment of interest*, which the Convention

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[3] As hackneyed as the reference has become, it is hard to resist repeating the familiar quotation from Lewis Carroll's *Alice Through the Looking-Glass* ch. 6:

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master--that's all."

For the reasons explained here, Lenell and its counsel will not be permitted to emulate Humpty Dumpty--except of course for their sharing the ultimate fate of having a great fall.

admittedly calls for--under local law. But that effort to equate those issues really misses its mark, for the following explanation demonstrates that such interest-rate-related rulings really support Zapata's position rather than Lenell's.

Look at the situation of the injured seller of goods and what is required to make it whole. There is of course no near-universal rate of interest on unpaid obligations, and the drafters of the Convention took note of the fact that some sellers injured by nonpayment for their goods would be made whole by applying the interest rates at their homes, while others would need prejudgment interest to be paid at the rate applicable at their buyers' locales to provide full relief (see Peter Schlechtriem, UNIFORM SALES LAW--THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 98-99 (Manz, Vienna 1986). For that reason the Convention's drafters called for the payment of prejudgment interest (which every unpaid seller needs for full recovery), but compromised by leaving the interest rate open for decision on a case-by-case basis (*id.*)--so that the injured seller's make-whole expectations are met by compensating it for its own cost of delayed payment as well as recovering the payment itself.

Now look at the situation of the same injured seller in terms of the other component of being made whole. Exactly as with prejudgment interest, that result is assured *only* by freeing its damages recovery from the burden of attorneys' fees. Little wonder, then, that the award of such fees is nearly universal among commercial nations (see the two Gotanda publications cited earlier). And surely in this instance, the make-whole expectations of the injured seller--a Mexican company--are best met by conforming to Mexico's own adherence to that nearly universal rule.

In sum, the award of attorneys' fees has really been agreed to, although Lenell does not now acknowledge it,[4] by the combination of Lenell's stipulation and Article 74. Because the amount of the fee award remains to be resolved, a status hearing is set for 9 a.m. September 5, 2001, to discuss the procedure and timing for that purpose.

Although what has been said to this point is dispositive of the issue, it is worth looking at Zapata's other string to its bow: its invocation of the inherent-power predicate for imposing a litigant's fees on its adversary where the adversary has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons" (*F.D. Rich*, 417 U.S. at 429) in its prelitigation or litigation conduct or both. Although *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) has become the most recent definitive case in that respect, the Supreme Court had earlier confirmed that teaching in such cases as *Hall v. Cole*, 412 U.S. 1, 15 (1973), reconfirmed in *Roadway Express, Inc. v. Piper*, 447 U.S. 752,

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[4] Lenell has studiously sought to avoid the fact that its own Amended Counterclaim filed January 3, 2000 (comprising a whole set of claims arising out of asserted late deliveries and other alleged nonperformance by Zapata) sought not only compensatory damages of some $225,000 but also, as part of its requested judgment on that counterclaim (emphasis added):

> In favor of Lenell and against Envases, awarding Lenell its interest, costs, disbursements, consequential damages, *attorneys fees* and other and further relief as this Court deems just and proper.

But now that the shoe is on the other foot, Lenell's position has mysteriously become that the attorneys' fees that *it* specifically sought under the Convention are somehow nonrecoverable by Zapata because of the American Rule. Leaving aside the level of hypocrisy (or perhaps even estoppel or "mend the hold" principles) raised by Lenell's stance, it need scarcely be added that whether under the Convention or otherwise, the case for attorneys' fees sought by a prevailing party from Mexico (where local law awards them) necessarily has to be stronger, if anything, than a like claim by an Illinois party (where local law does not).

766 (1980); *Alyeska Pipeline*, 421 U.S. at 258-59; and *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978).[5]

This Court has already spoken and written at some length about the bad faith with which Lenell and its people conducted their dealings with Zapata and then, when they ceased to do business with Zapata and the latter was forced to sue to collect for the unpaid sale price of its tins, with which they conducted this litigation. Instead of repeating that discussion, this opinion attaches Zapata Mem. 2-3, which provides an encapsuled and accurate description of Lenell's activity. That conduct by Lenell both leading up to and during the litigation supports an award of attorneys' fees pursuant to the inherent power doctrine under the cited Supreme Court decisions and such other cases as *United States v. Fidelity & Deposit Co.*, 986 F.2d 1110, 1120 (7th Cir. 1993).[6]

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[5] This opinion has used the term "teaching" advisedly, for Lenell's counsel--unable in any other way to blunt the force of what the Supreme Court has opined--has retreated to the fallback position of seeking to "distinguish" those cases because each of them involved a differing factual scenario. But it is a truism that every case is "distinguishable" from every other case in that limited sense. What is significant instead is that the Supreme Court has repeatedly and expressly stated the scope of the inherent power doctrine in the terms described in the text here--and this opinion is directly faithful to that unambiguous teaching.

[6] Because Lenell's late-advanced artwork counterclaim is pending before one of this Court's colleagues, this opinion has carefully steered clear of any substantive comments on that score. But this Court cannot help but remark that when Lenell and its counsel took a second look at Lenell's potential offensive position at the very beginning of the year 2000 (this action had been filed by Zapata in June 1999, Lenell filed its Answer and Counterclaim in August 1999 and then Lenell's Amended Counterclaim was submitted on January 3, 2000), that Amended Counterclaim catalogued no fewer than eight separate alleged breaches by Zapata that added up to the $225,000-plus counterclaim figure. Yet that second look, which was obviously the consequence of a fine-tooth-combing of the entire Zapata-Lenell relationship, contained not a whisper as to any alleged counterclaim for the

CONCLUSION

More than one line of analysis confirms Lenell's obligation to bear Zapata's attorneys' fees, so that Zapata may be made whole for the damages and expenses it has been forced to bear due to Lenell's misconduct. As stated earlier, with the next step being the quantification of that amount, this action is set for a next status hearing at 9 a.m. September 5, 2001.

[Zapata Mem. 2-3, incorporated by the district court as part of this opinion, see App., *supra*, 19a, follows verbatim.]

bad faith refusal to pay *anything* for the hundreds of thousands of tins that it received and used years ago, and its continuing course of misconduct throughout this litigation in denying any liability to Zapata, thereby dramatically and needlessly expanding the scope of this litigation to cover invoices for which Lenell had absolutely no defense against payment as a matter of law.

Under domestic law, this Court possesses the inherent power to award attorneys' fees and expenses where such fees and expenses are incurred as a result of bad faith conduct. *Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991). It is difficult

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nonreturn of artwork belonging to Lenell. There is no question that Lenell was both then and earlier in possession of every fact regarding that relationship (which had terminated nearly a year earlier)--Lenell's own key witnesses so testified during the trial. Yet it was not until later, when the case called for the preparation of the final pretrial order (the prelude to trial), that the supposed artwork claim miraculously sprang to life in the form of still another proposed amendment to Lenell's counterclaim. And of course no plausible argument could be advanced that anything in the discovery process was needed to learn the existence of such a claim--as just stated, all of the underlying facts were already in Lenell's own possession. Although the as-yet-unresolved artwork issue has not formed part of the matrix for decision here, Lenell's attempt to delay the day of reckoning by the belated injection of that added claim surely seems suspect.

to imagine a clearer case of bad faith than this one. Indeed, Terry Cohen admitted on the witness stand that on March 10, 1999, in response to Zapata's decision not to ship any more tins to Lenell until Lenell paid its past due balance in full, he threatened Zapata that as a former supplier, Zapata would no longer have any priority for payment. That testimony speaks volumes of Lenell's true motivation. As Mike Gibson and Dennis Headley both testified, Terry Cohen told Zapata in no uncertain terms that if Zapata stopped shipping any more tins to Lenell, Zapata would never get paid– and, in fact, that is exactly what happened. Since that date more than two years ago, Lenell has refused to pay Zapata even a *dime* for any of the 1.6 million tins that Lenell kept and used even though Lenell's own records showed it owed Zapata hundreds of thousands of dollars for the tins. Lenell thus carried out its threat as retribution for Zapata's audacious decision not to ship any more tins until Lenell paid for the tins it had already received.

To make matters even worse, Lenell decided to make it as difficult and expensive as possible for Zapata to receive its money in this litigation. Despite its own accounting records, and the fact that Lenell had absolutely no defense to payment of invoices totaling $857,796.90, Lenell answered the complaint by generally denying that Lenell "breached its contractual obligation" and by specifically denying that Lenell as "liable for *any* damages for any alleged breach." Answer, ¶ 2 (emphasis added) (attached hereto as Ex. 2). Lenell never amended this answer. Through its general denial, Lenell dramatically expanded the scope of this litigation, including discovery and the trial, by forcing Zapata to undertake the difficult and time-consuming task of proving its entitlement to payment for more than 100 invoices that Lenell knew full well it was obligated to pay.

Lenell's general denials also could not have been the product of any mistake, or any claim that it lacked sufficient information to confirm its obligation to pay Zapata's uncontested invoices. At the very outset of this litigation,

Lenell answered Zapata's requests for admission, and admitted to receiving, accepting and using virtually all of the tins that have been the subject of this litigation, thereby establishing the very facts that, after a lengthy and needless trial, entitled Zapata to judgment as a matter of law with respect to those invoices.

In the simplest terms, this is a case of an extreme bad faith refusal to pay, both before and during this litigation, and which continued through the trial itself. Accordingly, Zapata is entitled to recover its attorneys' fees not only as an element of consequential loss under the Convention, but under the Court's inherent power to award attorneys' fees in cases of bad faith; and pursuant to 28 U.S.C. § 1927.

Milton I. Shadur
Senior United States District Judge

Date: August 28, 2001

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ZAPATA HERMANOS SUCESORES, S.A., *Plaintiff*,

v.

HEARTHSIDE BAKING CO., INC., etc., *Defendant*.

No. 99 C 4040.

March 12, 2002.

MEMORANDUM OPINION AND ORDER

SHADUR, Senior District J.

Since the issuance of this Court's February 12, 2002 memorandum opinion and order ("Opinion") dealing with one aspect of the award to Zapata Hermanos Sucesores, S.A. ("Zapata") of certain attorneys' fees and expenses that it has paid and incurred in connection with its completed litigation against Hearthside Baking Co., Inc. d/b/a Maurice Lenell Cooky Co. ("Lenell"), the parties have completed their evidentiary presentations on that subject. At this point the matter is ripe for disposition.

To a greater extent than was the case as to the underlying merits of the litigation (in which a very minor part of Lenell's opposition to Zapata's claim proved to be viable), Lenell has come up empty--in this instance, totally empty--on the issue of fees and expenses. Just as Lenell succeeded in dragging out what should have been a relatively simple collection case for goods sold and delivered by interposing a host of unwarranted roadblocks that unjustifiably converted the litigation into an enormously time-consuming and expensive lawsuit, so its

efforts to attack the fee request by Mayer Brown & Platt (now Mayer Brown Rowe & Maw, but referred to here for convenience simply as "Mayer Brown") has done nothing more than to roil the waters without impeaching that request in any respect whatever.

To begin with, Lenell's purported expert--a lawyer of some 25 years' standing, on whose opinions Lenell seeks to bottom the bulk (though not all) of its opposition--appears from his resume to be an experienced litigator. But as his Fed.R.Civ.P. ("Rule") 26(a)(2)(B) report and his hearing testimony have made abundantly clear, and as this opinion will explain in some detail, he has shown himself to be entirely unqualified to render a credible opinion on the issues posed by this case. Whether or not he might have placed himself in a position to do so by striving to build on his existing foundation as a practitioner, through the extensive amount of further analysis, further research and further work that would have been required to that end is a moot issue--for what controls instead is that he did *not* engage in that major building project[1]. And as for Lenell's lawyer handling the fee litigation itself,[2] he frittered away his, opposing counsel's and this Court's time in attempted challenges that also cannot survive any reasoned scrutiny.

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[1] For that reason this opinion will consistently place the word "expert" in quotation marks. Without that cautionary usage--because to label someone unqualifiedly as an "expert" tends to lend credence to whatever that person has said--the attribution of that presumed badge of credibility might have blunted the force of the criticisms voiced here. As is demonstrated in spades in this opinion, there is no way in which the opinions voiced by Lenell's witness can be characterized as exhibiting any quality of expertise in terms of the situation presented by this case.

[2] This is framed in the singular because, although a second lawyer also filed an appearance on Lenell's behalf, he really played no active role in the fee proceeding.

To return to Lenell's claimed "expert," some idea of the real absurdity of his opinions may be gleaned from his repeated emphasis that this was a collection case--a simple case of goods sold and delivered--so that the hourly rates charged by Mayer Brown were assertedly excessive. As the "expert" said at the outset of his statement in that respect in his Rule 26(a)(2)(B) report:

> This case did not involve a technical or novel area of law, but was a collection case for monies owed for goods supplied.

And given that skewed view (more of this later), what did the "expert" tender as assertedly comparable litigation? Two lawsuits that his law firm had brought in the Municipal Department of the Circuit Court of Cook County on behalf of Ameritech against lessees that were in default under equipment leases, one of those lawsuits asserting damages of less than $3,000 and the other claiming damages of less than $4,000. Total attorneys' fees sought in each case were $1,000, at an hourly rate of $160. For the claimed "expert" to suggest that those lawsuits could be the source of probative evidence as to this case--a case involving a claim of some $1.3 million for a very large number of deliveries of cookie tins, hopelessly complicated as the case was made by Lenell by creating the need to investigate, prepare for and successfully oppose Lenell's late-advanced, convoluted, multifarious and (regrettably) baseless defenses and counterclaims, might have been thought of as a bad joke had it not been for the "expert's" having advanced his argument with a straight face.[3]

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[3] To obtain a further demonstration of why no legitimate claimant to the mantle of an expert could characterize the underlying litigation here as a simple and straightforward collection matter (or as a simple breach of contract lawsuit), one need only review the trial transcript, as well as the series of opinions that this Court was called upon to render to resolve a host of hotly-disputed aspects of the case--e.g., this Court's December 8, 2000 opinion ruling on the parties' respective motions in limine; its lengthy July

That same oversimplistic (and insupportable) approach marked what the "expert" labeled as his "survey" of relevant market hourly rates in the Chicago area. First, to characterize what was done as a survey at all is wholly at odds with the methodology required of *any* valid survey. All that the "expert" did was to self-select a small sample of a handful of small law firms (about a dozen in number) that he knew to be involved in the handling of such collection cases as he mischaracterized this litigation to have been.[4] Even apart from that wholly unscientific approach to the conduct of any survey properly understood, the effort was doomed to failure because it proceeded from the "expert's" commitment to a totally false premise about the nature of the litigation. In the computer field such efforts, proceeding from a mistaken assumption to a necessarily mistaken conclusion, long ago earned the sobriquet "GIGO": "Garbage in, garbage out."

18, 2001 opinion and judgment order rejecting, as to all but two minor adjustments, Lenell's post-verdict Rule 50 and Rule 59 motion ("all of it of the type that attempts to fling gobs of mud toward a wall or ceiling, hoping that as much as possible will stick"); its brief July 19 opinion rejecting still another Lenell "dog-in-the-manger approach" in the form of a second Rule 59 motion; its August 22 opinion (155 F.Supp.2d 969) holding Lenell's counsel liable for Zapata's incremental lawyers' fees attributable to the Lenell lawyers' violation of 28 U.S.C. § 1927; and its August 28 opinion holding Lenell itself liable for the fees that are ultimately dealt with in this opinion, a liability supported both by the Convention on the International Sale of Goods and, secondarily and alternatively, by application of the inherent power doctrine.

[4] That process was further skewed by the "expert's" additionally mistaken perception that what was called for here was equivalent to obtaining Bankruptcy Court approval of a claim for fees based on the known need for such approval from the outset, as contrasted with the substantively different situation explained and discussed in the Opinion and the precedents relied upon there. Indeed, all too much of the "expert's" direct testimony was taken up with that nonanalogous subject.

It would be possible to dissect the "expert's" opinions on the subject of the appropriate hourly rates strand by strand, repeatedly exposing the groundlessness of those opinions, but it is scarcely necessary to do so. Perhaps the most graphic demonstration of what has to be viewed as a worthless opinion on the subject came in the witness' response to the final question posed to him during his examination on the stand, one posed by this Court: When asked whether he was even *aware* of the two critically important decisions by our Court of Appeals that were cited and quoted in Opinion at 4-6 (the *Balcor* and *Medcom* cases), the "expert" was candid enough to say "no."[5] For anyone who holds himself out as qualified to render an opinion on fees in a case such as this one not to have done the necessary homework to learn (let alone to know in advance) about such highly relevant authorities, so that the witness might at least attempt to explain why they are not persuasive (let alone controlling) authorities here, is to confirm that witness' total *lack* of qualification.

It is also frankly unnecessary to go through the step by step analysis marked out by *Daubert v. Merrell Dow*

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[5] As the Opinion pointed out, those decisions conclusively show the wrongheadedness of the approach voiced in the "expert's" Rule 26(a)(2)(B) report (which was repeated at length in his testimony):

> The hourly rates charged by the plaintiff's counsel exceed the market rate in the Chicagoland area for comparable services by attorneys with equal or greater experience. The rates charged by plaintiff's counsel's firm do not accurately reflect the actual Chicagoland market rate for attorneys in the area of commercial litigation or international business litigation. The rates set by Mayer, Brown and Platt are not based upon the actual market for legal services in the Chicago area, but are arbitrarily set and raised. The rates charged for a case of this nature are excessive.

But even if the "expert's" just-stated view of the market were somehow to be accepted, his unreliable methodology referred to in the preceding paragraph of the text saps his opinions of any force.

Pharmaceuticals, Inc., 509 U.S. 579 (1993) as refined by *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)--and as both of those seminal authorities have been reinforced by the recently revised Fed.R.Evid. ("Evid. R.") 702 and its accompanying Committee Note--to confirm the inadmissibility of opinion evidence such as that proffered by Lenell here. What has already been said really torpedoes that opinion both in terms of its utter lack of reliability (*Daubert*, 509 U.S. at 589-90) and "fit" (*id.* at 591)--in the latter respect, the opinion's total failure to fit "the particular circumstances of the particular case at issue" (*Kumho*, 526 U.S. at 150).[6] And those deficiencies in turn support the outright rejection as inadmissible of the entire aspect of the "expert's" opinion dealing with hourly rates. But even were that testimony to be found technically admissible, it is so flawed as to compel its rejection on grounds of weightlessness. Instead the evidence squarely supports the reasonableness of the rates that were charged by the Mayer Brown lawyers and were then vetted and approved by Zapata's general counsel--not only under the principles set out in *Balcor* and *Medcom*, but independently of those decisions as well.

To shift to consideration of the reasonableness of the time spent by the Mayer Brown attorneys in the litigation, the just-explained total unreliability of the Lenell "expert's"

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[6] As chance would have it, the writer of this opinion (who now chairs the Judicial Conference's Advisory Committee on the Rules of Evidence) was, at the time that the December 1, 2000 amendment to Evid. R. 702 and its accompanying Committee Note were in the lengthy gestation process leading to adoption, the chair of the Advisory Committee's subcommittee assigned to the project of addressing Evid. R. 701 through 703. In that capacity the writer had the primary responsibility for reviewing and for placing into their ultimate form the versions of Evid. R. 702 and the Committee Note originally drafted for Committee consideration by its outstanding reporter, Professor Dan Capra of Fordham Law School. And as a reading of the extensive Committee Note will disclose, it (like *Daubert* and *Kumho*) fully anticipated the type of unreliable and ill-fitting opinions that have been proffered here--and it too teaches the flat-out rejection of such opinions.

opinion as to hourly rates points to the discrediting of his views on the subject of time expenditure as well. On that score, this is one case that merits application of the principle "falsus in uno, falsus in omnibus," for once again the reliability of the "expert's" opinion as to time spent is fatally distorted by his misperception of the underlying litigation as a straightforward collection matter. That negates any degree of credence to be ascribed to the "expert's" notion of what time budget should be attributed to the case. Instead this Court finds totally credible the testimony of Zapata's attorneys--most particularly the thorough explanation given by Mayer Brown's Javier Rubinstein in his rebuttal testimony--as to (1) the reasons for the use of three lawyers in the case (with no duplication of effort being involved) as well as to (2) the reasonableness of the numbers of hours devoted to the litigation.

While the discussion to this point has shown how the exposure of the opinions of Lenell's purported "expert" to the sunlight of analysis has shriveled those opinions into nothingness, the balance of this opinion will address how the efforts by Lenell's hearing counsel to impugn the time charges by the Mayer Brown lawyers were even worse--were downright bogus. Thus, for example, the protracted interrogation by Lenell's counsel about a claimed lack of detail reflected in the time entries (most extensively by criticizing the entries' listing of "trial preparation" without particularization as to the specific tasks involved) was totally bootless as a challenge to those entries. That bootlessness is twofold.

First, all of the Mayer Brown time entries were prepared solely for consideration by its client Zapata, *not* in contemplation of court review. This was not a situation involving a fee-shifting statute (see the rejection of that claimed analogy in *Medcom*, 200 F.3d at 520-21). Not only were the bills prepared for Zapata's consumption alone, but its house counsel vetted and approved all of those bills (as stressed in *Balcor*, 73 F.3d at 153).

Second and just as importantly, Mayer Brown expressly *invited* Lenell's counsel to pose any questions at all having to do with providing more detailed descriptions of any time entries, so that the Mayer Brown lawyers could then go back if necessary to reconstruct just what particular work was being done at any given time. Here is the last paragraph of the November 16, 2001 letter from Mayer Brown's Thomas Lidbury to Lenell's counsel Timothy Touhy (Zapata Fee Ex. 2):

> If you have any other questions please let me know. In particular, if any of your objections are based upon a lack of detail, or hinge in some way on additional information about an entry, please let me know. We should deal with that sort of thing before we both brief the issue.

No response whatever came back from Lenell's counsel during the ensuing months before the evidentiary hearing. For attorney Touhy now to challenge and cavil at any claimed lack of detail, as he did by repeated questioning of the Mayer Brown lawyer witnesses during the hearing, can only be viewed as the bad faith pursuit of this fee litigation.

That was equally true of the attempt by Lenell's counsel Touhy to charge Mayer Brown with the expenditure of excessive time--an effort that took the form of contrasting the recorded 234 hours of "T1" trial preparation entries (time that was spent in getting ready for an anticipated, but then postponed, February 2001 trial date) with the 336 hours of "T2" trial preparation entries (reflecting time spent thereafter in getting ready for the actual June 2001 trial). Lenell's counsel sought to portray that as the needless expenditure of nearly another 150% of the original time to "get ready" for a case that had already been trial-ready.

Not so: Cancellation of the first (February) trial date came with 11 days left to go before the anticipated D Day of February 19--time that would have involved the most concentrated activity of what Mayer Brown's Rubinstein described as an

expected ten hours per day for each lawyer on a seven-day-work-week basis. When that time, which would have been required (and spent) if the February date had been adhered to (a subject on which this Court finds the testimony of attorney Rubinstein entirely credible), is properly moved from the T2 to the T1 category, it can be seen that no padding or excessiveness was involved. Any modest amount of work that had to be redone to prepare for the June trial was the natural consequence of the Mayer Brown attorneys' having to get the trial engine revved up again (including any necessary refresher work) after the ignition had been turned off in February.

Still another aspect of Lenell's attack that can be perceived only as advanced in bad faith is its counsel's attempt to question and stress the fact that about $150,000 of the $440,000-plus of fees (exclusive of interest) that are sought to be recovered in this proceeding has not yet been paid by Zapata. In that respect Zapata's trial counsel explained that was the result of insufficient cash flow being sustained by Zapata--scarcely surprising in light of the still-continued failure by Lenell to pay even $1 toward its obligations, even though its own records have always shown that it owed Zapata far, far in excess of a half million dollars. In fact Zapata acknowledges that it is firmly obligated to Mayer Brown for the entire amount billed by the law firm, and Zapata continues to make further payments on account as its cash flow permits. For Lenell to dispute any part of the fees claim because such fees have not yet been paid by Zapata--a factor due entirely to the manner in which Lenell has dishonored its own acknowledged obligations to Zapata--has (as this Court has previously said) exactly the same degree of merit as the plea of the defendant who, having been found guilty of murdering both his parents, asks the court for mercy because he is an orphan.

This opinion has sought to deal in terms only with the highlights (or more accurately the lowlights) of Lenell's attempted onslaught on the Zapata request. Suffice it to say that

this Court has examined and has carefully considered every other argument presented by Lenell and has found them all equally wanting (so that any absence of express treatment in this opinion should be viewed as without significance). On the other side of the coin, Zapata's evidentiary presentation has been wholly credible and entirely persuasive.

Accordingly the Zapata motion is granted in its entirety. Its Fee Ex. 6 has calculated compound interest through various dates, and the one applicable to this opinion (projecting one more day for docketing) calls for $43,357.64 in compound interest in addition to the principal sum of $493,746.14, or a total of $537,103.78. Judgment is therefore ordered to be entered in favor of Zapata and against Lenell in that aggregate sum of $537,103.78.[7]

Milton I. Shadur
Senior United States District Judge

Date: March 13, 2002

[7] This opinion has not taken account of the possibility of awarding fees for services rendered by Mayer Brown in this fee proceeding itself, a type of award that our Court of Appeals has approved from time to time despite the prospect described by Jonathan Swift's lines of doggerel:

> So, naturalists observe, a flea
> Hath smaller fleas that on him prey;
> And these have smaller still to bite 'em;
> And so proceed *ad infinitum*.

In that respect it would of course be possible to avoid Zeno's Paradox (another expression of the same ad infinitum proposition) by estimating the amount of time and therefore the fees attributable to the final increment of fees-on-fees work.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 01-3402

ZAPATA HERMANOS SUCESORES, S.A.,

Plaintiff-Appellee,

v.

HEARTHSIDE BAKING COMPANY, INCORPORATED, doing business as MAURICE LENELL COOKY COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 4040—Milton I. Shadur, *Judge*.

January 9, 2003

Before
Hon. Richard A. Posner, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terrence T. Evans, *Circuit Judge*

ORDER

On December 3, 2002, plaintiff-appellee filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of

the active judges* has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

---

* Hon. Joel M. Flaum and Hon. Ann Claire Williams did not participate in the consideration of the petition.

APPENDIX E

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 15 U.S.C.A. App.

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

(2)

No. 02-1318

Supreme Court, U.S.
FILED
MAY 13 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ZAPATA HERMANOS SUCESORES, S.A.,

Petitioner,

v.

HEARTHSIDE BAKING COMPANY, INC. d/b/a MAURICE LENELL COOKY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Respondent submits that the following questions more accurately reflect the issues presented in Zapata Hermanos Sucesores, S.A.'s Petition For A Writ Of Certiorari.

1. Whether the court of appeals in a case of first impression in this country, erred in determining that attorneys' fee awards are not available under the Convention on the International Sale of Goods because: (1) the text and history of the Convention make clear it deals exclusively with substantive matters, while fee awards are a matter of procedural law throughout the world and thus governed by the forum's rules of civil procedure; (2) were never considered by the drafters of the Convention; and (3) their allowance to plaintiffs would produce unintended anomalies?

2. Whether the court of appeals erred in vacating the district court's $550,000 inherent authority, blanket fee award because: (1) it did not specify the alleged misconduct or how it had caused any harm; (2) virtually all the fees that were incurred in this case were caused by the district court's erroneous pre-trial ruling; and (3) the record makes clear that the sanction was imposed based on the defendant's pre-litigation conduct (i.e., not paying), which the district court held could be a basis for a blanket fee award?

3. Whether there is a conflict among the circuits on either issue presented by the Petition For A Writ Of Certiorari?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The corporate respondent has no parent, and there are no publicly held companies that hold any stock of the respondent.

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STATEMENT OF THE CASE

A.

A breach of contract claim governed by the Convention On Contracts For The International Sale of Goods ("CISG") was tried in the district court.[1] Plaintiff, Zapata Hermanos Succesores ("Zapata" or "petitioner"), prevailed. The district court awarded the petitioner *all* of its legal fees, totaling $550,000, pursuant to Article 74 of CISG which provides:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of the contract.[2]

The district court also concluded that the inherent authority doctrine justified the blanket fee award.

Defendant, Hearthside Baking Co. Inc. d/b/a Maurice Lenell Cooky Co. ("Lenell"), appealed the fee award.[3] A Seventh Circuit panel, comprised of Judges Posner, Wood and Evans, vacated the entire fee award, (313 F.3d 385),

---

[1] CISG, a treaty to which the United States is a signatory, is set forth at 15 U.S.C. App.

[2] Articles 75-78 provide the specific monetary damages that are available in certain instances and along with Article 74 are set forth in the Appendix, *infra* at 1, along with Judge Posner's decision which is reported at 313 F.3d 385 (7th Cir. 2002). (App. *infra* at 4).

[3] Lenell's appellate counsel did not participate in the trial of the underlying case.

and the court denied unanimously a petition for rehearing en banc. Writing for the unanimous panel, Judge Posner concluded that "the convention is about contracts not procedure," and thus because the recoverability of attorneys' fees is a procedural matter, it is governed by the forum's procedural rules. This is consistent with CISG explicit recognition that CISG deals exclusively with substantive provisions of law. *See*, Argument I, *infra*. In federal courts, the applicable procedural rule is the "American Rule" which does not allow for the recovery of attorneys' fees. 313 F.3d at 388.

Judge Posner rejected Zapata's interpretation of Article 74 for two additional reasons. First, construing it to allow for the recovery of attorneys' fees incurred during litigation would produce "anomalies" not uniformity, as Zapata has claimed. (Petition at 9-19).

> The interpretation of 'loss' for which Zapata contends would produce anomalies, which is another reason to reject the interpretation. On Zapata's view the prevailing plaintiff in a suit under the Convention would (though presumably subject to the general contract duty to mitigate damages, to which we referred earlier) get his attorneys' fees reimbursed more or less automatically (the reason for the "more or less" qualification will become evident in a moment). But what if the defendant won? Could he invoke the domestic law, if as is likely other than in the United States that law entitled either side that wins to reimbursement of his fees by the loser? Well, if so, could a winning plaintiff waive his right to attorneys' fees under the Convention in favor of domestic law, which might be more or less generous than Article 74 . . . . 313 F.3d at 388-389.

Second, he rejected it because "[t]o the vast majority of the signatories of the Convention, being nations in which the loser pays is the rule anyway, the question whether loss

includes attorneys' fees would have held little interest; there is no reason to suppose they thought about the question at all." 313 F.3d at 391.

This sound determination does not warrant review. First, there is no division among the circuits over whether Article 74 allows for the recovery of attorneys' fees. The Seventh Circuit is the first appellate court to address this issue. This alone warrants denial of the Petition. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (*Certiorari* denied where the issue requires further study in the lower courts before it is addressed by this Court). Conflict with a handful of international decisions (many of which were arbitration panels) does not warrant *certiorari* because "[t]he Court is only interested in conflicts which its decision in a particular case will remove." Frankfurter and Hart, *The Business of the Supreme Court at the October Term*, 1933 Harvard L. Rev. 238, 268 (1934). *Accord* 23 Moore's Federal Practice § 510.21[3][a] (3d ed. 1991). Here, there is no such type of conflict because the Supreme Court has no authority over foreign tribunals. *Cf.* 23 Moore's Federal Practice, *supra* at § 510.22[2] (the Court refuses to hear matters of state law where no federal issue is involved because of "its inability to compel states to follow its decision").

Second, Judge Posner's determination that attorneys' fees are not recoverable under Article 74 only effects the small number of CISG cases tried in the United States. Throughout the rest of the world, attorneys' fees can be recovered pursuant to the forum's procedural codes. *See* Argument I, *infra*. As there have been very few CISG cases of any kind in the United States[4] and none involving

---

[4] *See Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2nd Cir. 1995) (virtually no CISG "caselaw exists").

attorneys' fee, debate over the availability of attorneys' fee awards does not warrant this Court's review. "[A]cademic or episodic debate" does not warrant the granting of *certiorari*. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

Judge Posner also reversed the inherent authority award, concluding that an inherent authority fee award "is a residual authority to be exercised sparingly, to punish misconduct (1) occurring in the litigation itself, not in the events giving rise to the litigation (for then punishment would be a product of substantive law . . .), and (2) not adequately dealt with by other rules, most pertinently here Rules 11 and 37 of the Federal Rules of Civil Procedure, which Lenell has not been accused of violating." 313 F.3d at 391. The court below also made clear that any "fault here was in no small measure the judge's" for failing to grant defendant's partial summary judgment motion. The Petition does not challenge this conclusion. On remand, the court of appeals reassigned the case in accordance with Seventh Circuit Rule 36 because of the district court's deprecatory treatment of Lenell and its counsel. 313 F.3d at 391-392.

Judge Posner's determination that the district court's inherent authority fee award was improper is in conformity with *Chambers v. NASCO*, 501 U.S. 32 (1991). The Petition's claim that there is a split in the circuits over the "meaning" of *Chambers* (Petition at 22-29) is plainly wrong. *Chambers* held that:

> [W]hen there is bad faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute or Rules are up to the task, the court may safely rely on its inherent authority. *Id.* at 50-51.

The opinion below says precisely the same thing. An inherent authority fee award is to address wrongs "not adequately dealt with by other rules, most pertinently here Rules 11 and 37 of the Federal Rules of Civil Procedure." 313 F.3d at 391. Authorities from the other circuits are in accord with this aspect of *Chambers*.

Chambers also held that "the imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." 501 U.S. at 44, 53. Judge Posner's opinion reiterates the principle. An inherent authority fee award is to address conduct "occurring in the litigation itself, not in the events giving rise to the litigation." 313 F.3d at 392. This is the "uniform view among the circuits." *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.*, 976 F.2d 541, 548-49 (9th Cir. 1992).

In sum, there does not exist a conflict let alone an "important conflict" among the circuits over the meaning of *Chambers* that "create[s] an intolerable conflict among the nation's lower courts" and warrants this Court's review of Judge Posner's decision. S. Baker, *A Practical Guide to Certiorari*, 33 Catholic Univ. L. Rev. 611, 617 (1984). *See also* Supreme Court Rule 10(a). The Petition should be denied.

B.

Maurice Lenell is a small, family owned, commercial wholesale baker, which since 1937 has been selling cookies to institutional buyers. By at least mid March 1998, there was a dispute concerning how much Lenell owed Zapata,

one of its suppliers. (Tr. 69-70).[5] The parties had several meetings and phone calls to resolve their difficulties. They could not agree on what was owed, (Tr. 149, 171-178, 184-200, 372, 539, 617), although Lenell's books showed several hundred thousand dollars were owed, and Lenell's CEO estimated Zapata was owed between $400,00 and $500,000. As so often happens in these kinds of cases, the parties had differing views of what occurred and of their rights and responsibilities. Zapata threatened to stop all shipments without payment in full; Lenell responded that former suppliers do not have the same priority as present ones. (Tr. 84, 315, 323, 539).

Zapata then sued under CISG. (R. 1). After a trial, the court awarded Zapata[6] judgment for $857,796.90, as a matter of law. (Tr. 863-866). The jury awarded Zapata interest in excess of $300,000, and denied any recovery on Lenell's counterclaim. (R. 65-67). After Zapata prevailed on its approximately $900,000 breach of contract claim, it sought an attorneys' fee award under Article 74 of CISG. (R. 66). Lenell objected. (R. 92). In August 2001, the court concluded that Zapata was entitled under Article 74 to recover *all* its fees, totaling $550,000. This was the court's reasoning: (1) attorneys' fees are a "foreseeable" "consequence" of breaching a contract; (2) attorneys' fees are recoverable in most countries that have ratified CISG; and (3) several foreign decisions have awarded attorneys' fees under CISG. (R. 94; Appendix). The district court was apparently unaware that fee awards are everywhere a matter of procedural law.

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[5] The citations are to the trial transcripts ("Tr.") and the record ("R.") below.

[6] Plaintiff was not, as is claimed in the Petition, a small owned manufacturer. It is part of a huge international corporation.

The alternative basis for the imposition of the massive, blanket fee award was the court's inherent authority, which, the court held, allows sanctions for a party's "pre-litigation *or* litigation conduct *or both*," and that Lenell's conduct "*both leading up* to and during the litigation supports an award of attorneys' fees pursuant to the inherent power doctrine. . . ." (R. 95) (Emphasis supplied). The pre-litigation conduct was Lenell's failure to pay the amounts that were not reasonably in dispute; the litigation conduct was the continuing failure to pay those amounts and the filing of an Answer that denied "*any* liability." (R. 95 at 5). The court identified no other conduct, and its findings consisted of the attachment and incorporation of two pages of Zapata's memorandum in support of its request for fees. (R. 95 at 11). There was no claim that Lenell's counterclaims were made in bad faith or that the litigation as it pertained to them or the disputed portions of Zapata's claims were sanctionable. Nor was there any attempt by either Zapata or the district court to allocate how much of the total fees were attributable to the Answer or the non-payment.

Lenell's Answer to the Complaint (R. 5) denying liability could not authorize sanctions for *all* the fees incurred in the case. Lenell's responses to requests to admit in November, 1999, three months after the Answer had been filed, admitted facts giving rise to liability of $857,000, "as a matter of law" – according to Zapata's own filings in the district court. (R. 27 at 1, 8, R. 28 at 5, ¶¶ 28-43; Tr. 863-866). Although the district court had concluded before trial that these responses "acknowledged the very substantial amount that is due" (R. 55-3 at 11), it ignored their existence and effect on the case in awarding Zapata its fees for the *entire* litigation. And it ignored the effect this early admission had on the conclusion that the offending (to the Court) Answer justified the blanket fee award.

Yet, less than $15,000 in fees was expended to this point to secure these admissions. The balance of the claimed indebtedness which continued to be disputed was a proper subject for trial. Indeed, the district court recognized that even if Lenell had paid what was undisputed, "[t]his litigation would still have proceeded in that event." 155 F.Supp.2d at 972. Half of the trial transcript is occupied by proceedings related to the defense case, counter claim, jury instructions conference, closing arguments, jury instructions, and related matters. They were that part of the trial that would have occurred regardless of the Answer or payment. Nonetheless, the district court even awarded *all* the fees pertaining to this half of the proceedings.

Apart from the obvious fact that the mass of indesputably relevant evidence on all the issues went to the jury and occupied so much trial time was not sanctionable, the court itself recognized that the trial had been dramatically lengthened by the lawyers for both sides, who had given "insufficient thought to what the trial is all about." "Real thought," the district court lamented, would have gotten the trial over in 2½-3 days. (Tr. 802-803). Zapata's lawyers in this court were counsel in the district court. Ineptitude and thoughtlessness are not a basis for any fee sanction under the inherent authority doctrine or any other doctrine.

The district court made no attempt to determine how much of the plaintiff's case resulted from the denial in the Answer and/or the non-payment and ignored the responses to requests to admit, which effectively admitted virtually all of what was owed. That "acknowledg[ment]" precludes a sanction award that exceeds the cost of securing the admissions. *Smith v. Chicago Reform Board of Trustees*, 165 F.3d 1142, 1147 (7th Cir. 1999). Without an appropriate finding of causality between the harm and the offending conduct, any fee award is improper.

For the district court, Lenell's non-payment was an unpardonable ethical breach: "legitimate," "responsible business people" pay their debts. If they do not, the court concluded, they can be punished under a court's inherent authority. Put another way, "stiffing" a creditor – an epithet of which the district court was fond (R. 55-3 at 5; R. 94 at 5; Tr. 328, 862) – is "bad faith" warranting blanket punishment. The court remanded the case because – contrary to the Petition's assertion – the district made no supportable findings of bad faith that would warrant an inherent authority attorney fee award. "Since the challenged award of $550,000 in attorneys' fees cannot stand, we need not pick through the record to see whether some of the counterclaims or other moves by Lenell during the trial were sanctionable. . . . " 313 F.3d at 391.

REASONS FOR DENYING THE WRIT

I.

CISG DOES NOT PROVIDE FOR AN AWARD OF ATTORNEYS' FEES

A.

CISG's drafters did not intend to deviate from the world consensus that attorneys' fee awards are a procedural matter governed by the procedural rules of the forum or to abrogate its signatory nations' rules of civil procedure. CISG's Introduction stresses that CISG "sets out substantive provisions of law;" it "'d[id] not [intend to] interfere with [procedural] domestic rules.'" (Introduction CISG, 15 U.S.C. App.)[7]

[7] *Accord* Harry Fletchner, *Recovering Attorneys' Fees As Damages Under The U.N. Sales Convention: A Case Study On The New International Commercial Practice And The Role Of Foreign Case Law In CISG*

(Continued on following page)

"[P]rocedural matters . . . remain within the province of national law, and procedural conceptions may still serve as covert limitations on CISG consequential damage awards." Eric Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 University of Pennsylvania Journal of International Business, 615 (1995) (citing Joseph M. Lookofsky, Consequential Damages in the Comparative Context 189, 238 (1989)).

In *MCC-Marble v. Cermaica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384 (11th Cir. 1998) (Petition at 12), the court concluded that *CISG*'s parole evidence rule governed the parties' dispute. *MCC-Marble* also stressed that the *forum's* procedural rules would govern the dispute. 144 F.3d at 1389, n.13.

Throughout the world, the availability of an attorneys' fee award is a procedural matter governed by the forum's code of civil procedure, not by its substantive laws. The European community has concluded that as a matter of policy a loser-pays rule is in society's best interest, and European states' codes of civil procedure contain fee shifting rules. For example, Section 91 of the German Code of Civil Procedure provides that "the losing party bears the costs of the lawsuit." The Swedish loser-pays

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Jurisprudence With A Post-Script On Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co., 22 Northwestern Journal of International Law & Business 121 (2002); Joseph Lookofsky, *Zapata v. Hearthside Baking, 6* Vindbona Journal of International Comm. Law 27-29 (2002); Harry Flechtner, *The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parole Evidence Rule;* 18 Journal of Law and Commerce 259 n.136 (1999); Amy Kastely, *The Right to Require Performance in International Sales,* 63 Wash. L. Rev. 607 (1988).

provisions are found in Chapter 18:1 and 18:8 of the Swedish Judicial Code of Civil Procedure. The French loser-pays provisions are found in the new Code of Civil Procedure, Articles 695 and 696. The Danish loser-pays provisions are found at § 312 of the Danish Code of Civil Procedure. The English loser-pays rules are found in similar statutory and procedural enactments and are derived from the Statute of Gloucester. *See Fleischman v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

The United States has made a different policy judgment concerning the recoverability of attorneys' fees. *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 257 (1975). In the United States, however, like the rest of the world, attorneys' fees are considered a "cost," (not a component of damages) whose recovery is governed by procedural rules. *See* Rule 54(d)(1), Federal Rules of Civil Procedure ("costs, other than attorneys' fees shall be allowed as of course"); *In re Paoli R.R. Yard PCB Litigation*, 221 F.3d 449, 457-458 (3rd Cir. 2000); 10 Wright, Kane & Miller, Federal Practice and Procedure § 2665, at 199-200 (3d ed. 1998).

Recognition of these principles does not mean that Judge Posner was construing CISG by using domestic law (Petition at 13). Unlike the Petition, the court below began with a question not with an answer.

In *Conte v. Flota Mercante Del Estado*, 277 F.2d 664, 671 (2nd Cir. 1960), Judge Friendly addressed the availability of an attorney fee award pursuant to the laws of another nation which governed the parties' dispute. Consistent with Judge Posner's conclusion, Judge Friendly held that attorneys' fees could not be recovered under the foreign nation's law because the availability of attorneys' fees is a matter of procedural not substantive law. Obviously, *Conte* amply supports the decision below. Although cited in the brief below, Zapata ignored Judge Friendly's decision and continues to do so here.

Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 259, n.31 (1975) and *Chambers*, *supra*, 501 U.S. at 53 (Petition at 17 n.7) are not at odds with all these authorities and the Rules. *Alyeska Pipeline Service* and *Chambers* held that the availability of attorneys' fees is substantive, but only *for diversity purposes*. This simply means that the determination as to whether or not the availability of attorneys' fees are procedural or substantive is determined by examining whether or not fee awards are procedural under the laws of the forum state when the federal court is sitting in diversity jurisdiction. "[E]ven though attorneys' fees are substantive for diversity purposes, they are not necessarily substantive under [the forum state's] choice of law rules." *Midwest Grain Products v. Productization Inc.*, 228 F.3d 784, 791 (7th Cir. 2000). *Accord Boyd Rosene & Assoc. v. Kansas Municipal Gas Agency*, 174 F.3d 1115, 1118 (10th Cir. 1999).

Here, the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 over Zapata's claims, and the applicable federal procedural rules do not allow for the recovery of attorneys' fees. Moreover, even if the claim had been predicated on diversity jurisdiction, 28 U.S.C. § 1332, a fee award would still be unavailable, because under the forum's law (Illinois law), attorneys' fee awards are a matter of procedural not substantive law, and are barred by the American Rule. *Midwest Grain Products v. Productization Inc.*, *supra*, 228 F.3d at 791.[8]

[8] Numerous other states also view attorneys' fee awards as a matter of procedural not substantive law. *See e.g. Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991) (Idaho).

B.

Zapata's insistence that unless Article 74 is deemed to include attorneys' fees, the uniformity sought by the Convention will be lacking, begs the question to be decided. First, uniformity is a goal of CISG – but uniformity only as to the *substantive* rights and obligations of contracting parties. The text and history of CISG make clear that the drafters of CISG did not intend to interfere with *procedural* domestic rules. Whether CISG's substantive rights and obligations include the payment of attorneys' fees depends on whether they were intended to constitute "losses" under Article 74. Question begging cannot answer that question.

Second, it is no answer to say that attorneys' fees are necessary to make a successful plaintiff "whole." This argument also begs the question to be decided. Since attorneys' fees are available everywhere under codes of civil procedure, except in the United States, it does not follow that CISG's drafters must have intended that Article 74 require an award of attorneys' fees as a component of "losses." Nor does it follow that absent a fee award under CISG a prevailing plaintiff cannot be made "whole." For example, the New York Court of Appeals has held that despite the constitutional requirement of just compensation, the takings clause does not require an award of attorneys' fees in order to make the plaintiff whole. *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895 (1971).

C.

The structure, legislative history, and operative effects of CISG demonstrate that Article 74 was not intended to include attorneys' fees. Article 77 mandates that a plaintiff must "mitigate the loss . . . resulting from the breach," and that the party in breach "may claim a reduction in the damages in the amount by which the loss should have

been mitigated." Obviously, the word "loss" does not have a different meaning in Article 77 than it does in Article 74. If attorneys' fees are a component of loss under Article 74, a defendant would be entitled to have a jury determine whether the plaintiff had mitigated the "loss" by conducting the litigation in the most cost effective way. Since that determination could not be made until after the case was over – for the fees would not be known until then – loss cannot encompass attorneys' fees.

Professor Farnsworth has observed that the Article 70 of the prior CISG, whose language is identical to the current Article 74, comes "close to blending the Restatement of Contracts § 330, which allows recovery for 'injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made,' and UCC 2-715(2)(a), which allows the buyer recovery for 'any loss resulting from general or particular requirements and needs of which the seller at the time of the contracting had reason to know.'" Allen Farnsworth, 27 American Journal of Comparative Law 259 (1979). Although the UCC is not per se applicable, "UCC may inform the court where the language of the relevant CISG provision tracks that of the UCC." *Delchi Carrier SpA v. Rotorex Corp.*, *supra*, 71 F.3d at 1028.

Neither the Restatement of Contracts § 330 nor UCC 2-715(2)(a) allows for the recovery of attorneys' fees. It is idle to suggest that Article 74 requires an attorney fee award when the Restatement and the UCC, from which it is derived, do not allow for the recovery of attorneys' fees. A contrary conclusion would run afoul of the basic rule of statutory construction that "absurd" statutory constructions are to be avoided. *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

CISG's legislative history confirms that attorneys' fees are not available under Article 74:

> Referring to the *travaux pre'paratories* of the CISG . . . it appears that those who drafted and approved the final text of the Convention never indicated that Article 74 encompassed damages for the prevailing party's attorneys' costs – a significant omission given the lack of international consensus on the recovery of such costs. Indeed, from the formal records of the history of CISG it appears that the subject of recovering attorneys' fees never arose during the drafting and negotiation of the treaty. This strongly suggests that the United States and other countries that generally require litigants to bear their own attorneys' fees did not expect or intend that the CISG would change such a significant aspect of the litigation process. Flechtner, *supra*, 151.

Reading Article 74 to allow for attorneys' fees would result in a dramatic disparity in treatment among litigants. Since recovery of "loss[es]" is limited to those proving a contractual breach, only prevailing plaintiffs, but not prevailing defendants, could obtain a fee award. This approach not only abrogates the American rule in the United States, it would abrogate the loser-pays rule prevalent throughout Europe. Such an approach would jettison the two systems prevailing throughout the world in favor of a new approach that only allows prevailing plaintiffs to recover fees.

There is nothing in the history of CISG to suggest that its drafters intended such nonuniform treatment of plaintiffs and defendants, and nothing to suggest that CISG's signatories would have adopted so disruptive and far reaching a rule without any mention in CISG's text or legislative history that they intended so profoundly to restructure the existing framework. Judge Posner put it this way: "To the vast majority of the signatories of the

Convention, being nations in which the loser pays is the rule anyway, the question whether loss includes attorneys' fees would have held little interest; there is no reason to suppose they thought about the question at all." 313 F.3d at 391.

It would be equally absurd to suggest that Article 74 was intended to apply only as a matter of substantive law to prevailing plaintiffs, while relegating prevailing defendants to the forum's procedural law, with all its restrictions and local peculiarities. Such a forced construction would also result in a regime of unequal treatment, with the outcome dependent upon where the case was being litigated. Absent proof of the most compelling sort, it cannot be concluded that Article 74's drafters intended to introduce into CISG these uncertainties, inequalities, and incentives for forum shopping. Statutory construction requires an assessment of the real world situation to which the language applies.

Finally, a footnote to the 1978 Commentary to Article 70, which mirrors the language of Article 74, states that the time for measuring "loss" should be at "an appropriate [one] such as the moment the goods were delivered, or the moment the buyer learned the non-conformity would not be remedied by the seller under other articles of the convention." Jeffrey Sutton, *Measuring Damages Under The United Nations Convention On The International Sale Of Goods*, 50 Ohio State L.J. 742 (1989) (citing Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, 70, n.2 U.N. Doc. A/CONF. 97/5 (1979). Obviously, measuring the loss at either of these times results in the exclusion of attorney's fees as a component of "loss."

D.

All the Petition offers is a superficial, overly simplistic, and incorrect analysis of whether Article 74 allows plaintiffs to recover attorneys' fees. It adverts to the

existence of 275 foreign CISG cases – the inference – whether intentional or inadvertent – is that all hold that attorneys' fees are recoverable under Article 74. (Petition at 4, 11). However, only a handful of these cases have addressed the availability of attorneys' fees under Article 74, as demonstrated by the fact that Zapata only relied on a limited number of cases that ostensibly had held that attorneys' fees were recoverable under Article 74 in the court below.

Case No.17U146\93(OLG Dusseldorf 1/14/94) (Petition at 10) did not hold that post-lawsuit attorneys' fees are recoverable under Article 74. There, the plaintiff was only awarded its *pre-lawsuit* attorneys' fees under CISG. The remainder of its fees were awarded pursuant to the German Code of Civil Procedure's fee-shifting provisions. In imposing post-litigation fees as a procedural matter under local law, the court in Dusseldorf acted consistently with other German courts that have done the same thing. *See also* Flechtner at 129-131.

Zapata's two other authorities are similarly distinguishable. (R. 73 at 4, Ex. 4, 5; R. 94) In the first (R. 73, Ex. 3), the court primarily relied on and "discussed at far greater length than the holding based on CISG Article 74 . . . an interpretation of the parties' contract, as including an implied term requiring a breaching party to pay such compensation." Fletchner, *supra* at 129-131. The second decision (R. 73, Ex. 5) was rendered by a German petty court, and its summary was less than a half page long. These two opinions hardly constitute a uniformity of decision in favor of awarding "fees under Article 74. Moreover, judicial opinions are not fungible; they "do not have equal intrinsic authority." *Adamson v. California*, 332 U.S. 46, 59 (1947). In the cases relied on by Zapata, there was not the careful

analysis required before any court should rely overmuch on them.[9]

Air France v. Saks, 470 U.S. 392, 400 (1985) (Petition at 9) held that foreign decisions should be consulted to assure that the "specific word" in a treaty is construed "consistent with the *shared expectations of the parties*." (Emphasis supplied). Here, as Judge Posner showed, there are no "*shared expectations*" of CISG's signatory nations. 313 F.3d at 389.

In *Air France*, particular attention was given to the French interpretation of the word "accident" because the treaty was drafted in French. The Court, however, stressed that the "negotiating history of the Convention, the conduct of the parties to the Convention . . . and [the treaty's legislative history]," are "proper" sources to refer to when interpreting a treaty, and that *each* supported the statutory construction adopted by the Court. This Court made clear that it was not bound by French courts' decisions just because they had spoken first: We are not "forever chained to French law by the Convention." 470 U.S. 399-401. Rather, French decisions were interpretative tools. Here, all the sound interpretive tools lead to the

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[9] Professor Fletchner discussed other authorities which held that fees are recoverable under Article 74. One involved a default judgment, which due to its one sided nature is not conducive to a comprehensive and informed consideration of the issues. *Cf. Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring). The decision also contained only a cursory analysis of the issue. Fletchner, *supra*, at 129-131. Another case is an arbitration panel decision, and "it is not entirely clear what is included in the damage award." Fletchner, *supra*, at 129-131. Arbitration decisions are not particularly persuasive, given their nature. Tellingly, the Petition only cites two authorities that were not cited in the courts below for the proposition that Article 74 authorizes attorneys' fee awards. One is another arbitration panel decision (Petition at 11 n.5), the other is another laconic German decision predating Judge Posner's decision. (Petition at 11).

inescapable conclusion that Article 74 does not allow for the recovery of attorneys' fees.

The literature does not "strongly" support Zapata's position, either. (Petition at 11). Indeed, it does not support it at all. Professor Fletchner's article, *supra*, concluded that the district court's decision was "clearly incorrect," and a "misconstruction of Article 74." Professor Fletchner has authored at least 10 articles on the Convention. Professor Lookofsky has also concluded that the district court's determination that Article 74 allows for the recovery of attorneys' fees was not correct. Joseph Lookofsky, *supra*. Professor Lookofsky of the University of Copenhagen is recognized as one of the preeminent authorities on CISG and has authored over 25 articles and treatises on CISG. Both articles discuss at length the procedural nature of attorneys' fees awards, and their nonavailability under CISG.

In contrast, the two main authors on whom the Petition relies (Petition at 11-12) do nothing more than parrot the district court's decision. Each fails to address the procedural nature of attorneys' fees, the "anomalies" that reversal of this case would create, and offers little more than a vote in favor of the district court's analysis. *See* Felemegas, *An Interpretation of Article 74 CISG by The U.S. Circuit Court of Appeals*, to be published in 15 Pace Int'l L. Rev. (Spring 2003); Schlechtriem, *Attorneys Fees As Part Of Recoverable Damages*, 14 Pace Int'l L. Rev. 205 (2002). Neither begins to rebut Judge Posner's careful exegesis of Article 74, which has yet to be addressed by foreign or domestic courts, and thus is not yet ripe for review. *McCray v. New York*, *supra*, 461 U.S. at 963.

Finally, a third article cited by the Petition purports to criticize Judge Posner's decision, but agrees that while "awarding attorneys' fees as damages is in conflict with the majority of the world's legal systems," "the Appellate

Court correctly states that the District Court's interpretation of loss in the context of Article 74 would produce anomolies," and agrees that Judge Posner's decision was correct! Jarno Vanto, *Attorneys' Fees As Damages In International Commercial Litigation*, 15 Pace Int'l L. Rev. (Spring 2003). This is scarcely "strong support" for Zapata.

II.

THE DISTRICT COURT'S IMPOSITION OF $550,000 IN ATTORNEY'S FEES UNDER ITS INHERENT AUTHORITY WAS IMPROPER

A.

The record makes clear that the district court resorted to the doctrine of inherent authority because of its dissatisfaction with the "American Rule," which is applicable to contract breaches, *West Lafayette Corp. v. Taft Contracting*, 178 F.3d 840, 844 (7th Cir. 1999), and which prohibits recovery of attorneys' fees in the absence of a statute or contract provision allowing them. The district court lamented that the American Rule does "*not* make prevailing parties truly whole by saddling their adversaries with the winners' legal expenses – an omission that does not . . . put the winners in contract disputes into the same economic position as if they had performed their required obligations under contracts. . . . " (R. 95, Mem. Op. 2-3). To escape the American Rule and to make Zapata whole, the court invoked its "inherent authority." (R. 95 at 12). The only conflict in this case is that between the district court's decision and the uniform decisions of the circuit court of appeals.

The district court's sanctions opinion was unfaithful to *Chambers'* threshold imperative that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." 501 U.S. at 44. All the circuits have stressed that this principle of restraint must guide

analysis. *See e.g. Montrose Medical Group v. Bulger*, 243 F.3d 773, 784 (3rd Cir. 2001). The inherent authority doctrine is further constrained by the requirement that the court *find* that "fraud has been practiced upon it or the very temple of justice has been defiled." *Chambers*, *supra*, 501 U.S. at 46. The court below made no such findings, and its conclusory pronouncements did not approach this "extremely high" standard. *Goldin v. Bartholow*, 166 F.3d 710, 722 (5th Cir. 1999).

Only literary perversity or jaundiced partisanship could suggest that Lenell's Answer or its failure to pay was a "fraud" on the court or defiled the temple of justice. Far from being deceived about the case, the court was so informed about it that it excused the parties from the requirement, if there was to be a bench trial, of submitting the usual pretrial order, noting: "There's no mystery about this one on either side." (R. 55-4 at 3-4). Moreover, in light of Rule 16, Fed. R. Civ. P., which the court said it could employ (R. 55-3 at 2-3) – but did not – the portion of the very substantial amount "acknowledged" to be owed could effectively have been removed from the "temple" quicker than Ananias and Sapphira. Acts 5:1-12.[10] Indeed, Judge Posner concluded that the district court's failure to grant partial summary judgment was the cause of much of the harm that Zapata professes to have suffered. 313 F.3d at 391. ("But as it happens, the fault here, was in no small measure the judge's").

A further limitation on the inherent authority doctrine is that the fraudulent conduct must occur during the litigation, since a "primary aspect" of the court's inherent

[10] Of the approximately $1,000,000 damage award (exclusive of interest) the district court conceded that within 3 months of the Answer, Lenell had effectively admitted $850,000 through answers to request to admit. *See* Statement of the Case, *supra*.

authority "is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. * * * [T]he imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *Chambers*, 501 U.S. at 44, 53. The district court nonetheless held that pre-litigation conduct could suffice, and thus looked to Lenell's purported "stiffing" that preceded the lawsuit. But that is the same conduct the court found so objectionable after the suit was filed.

This holding was contrary to "[t]he uniform view among the circuits" that inherent power to award fees for bad-faith conduct "does not extend to the conduct upon which the suit is based." "Expansively applied, the bad faith exception risks conflict with the rationale of the American rule and hence should be construed narrowly." *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc., supra*, 976 F.2d at 548-49 (9th Cir. 1992). Incredibly, the Petition has cited this case for the proposition that inherent authority attorney fee awards may be based on the conduct that forms the basis of the lawsuit. (Petition at 26, 27). Judge Posner's conclusion on this point is consonant with the decisions of the other courts of appeals and with *Chambers*.

In *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1318 (10th Cir. 2000), a judgment creditor sued to set aside a fraudulent transfer and was granted summary judgment as well as attorneys' fees under the court's inherent power "based on the fraudulent nature of the transfer, as opposed to the conduct of the litigation itself." *Id.* at 1308. There, as here, the district court was incensed at the debtor "having done everything possible to avoid honoring just debts." 213 F.3d at 1316. The court of appeals reversed because the sanction was not based on the conduct of the litigation, but on "the underlying previous

conduct which gave rise to the cause of action . . . . " *Id.* at 1317. The court stressed that:

> Among the reasons given for the limitation is that a contrary rule would constitute a substantial abridgement of the American Rule. . . . A defendant found liable for fraud, for instance, would automatically be guilty of bad faith with respect to the underlying cause of action, thus abrogating the American Rule in all successful fraud actions. Such complete abrogation is not the purpose of the bad faith exception. *Id.* at 1318.

In *United States v. Fidelity & Deposit Co.*, 986 F.2d 1110, 1120 (7th Cir. 1993), the Seventh Circuit recognized that the "during the litigation" requirement protects against the danger of encroaching upon substantive law.

The other circuits have also recognized that only litigation conduct can be sanctioned under the inherent authority doctrine. *See Goldin v. Bartholow*, 166 F.3d 710, 722 (5th Cir. 1999); *Shimman v. Int'l Union of Operating Engineers*, 744 F.2d 1226, 1233 (6th Cir. 1984) (en banc) (Petition at 27) (to allow "an award of attorneys' fees based on bad faith in the act underlying the substantive claim would not be consistent with the American Rule"); *Lamb Engineering & Construction Co. v. Nebraska Public Power District*, 103 F.3d 1422, 1435 (8th Cir. 1997) (Petition at 26) (reversing sanctions under inherent authority based on defendant's "bad faith" breach of contract, since this was "pre-litigation conduct" that was part of the underlying substantive claim); *McLarty v. United States*, 6 F.3d 545, 548 (8th Cir. 1993) (same); *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 769 (10th Cir. 1997) (Petition at 27) (expansion of bad-faith exception to pre-litigation conduct "risks swallowing the Rule" and is "not warranted by the exception's purpose, nor authorized by its source"); *Woods v. Barnett of Fort Lauderdale Bank*, 765 F.2d 1004, 1014

(11th Cir. 1985); *Amsted Industries, Inc. v. Buckeye Steel Castings Co.*, 23 F.3d 374, 378 (Fed. Cir. 1994); 10 Moore's Federal Practice § 54.171[2][c][ii] at p. 54-266 ("we believe . . . that a finding of bad faith may only be based on conduct relating to the litigation"); 1 Mary Francis Derfner & Arthur D. Wolf, Court Awarded Attorneys' Fees ¶ 4.01[2] (1999).

The Petition's assertion that three of these authorities, *Shimman*, *Lamb Engineering & Construction Co.*, and *Towerridge, Inc.*, (Petition at 27), somehow support its contention that pre-litigation conduct can warrant an inherent authority attorney fee award is, at best, not well founded, and runs afoul of the admonition that "[i]f you don't have [a split] don't try to fake it . . . The Court will never grant cert because of a conflict without reading the cases carefully." S. Baker, *supra*, 33 Catholic Univ. L. Rev. at 619.

Susman v. Bank of Israel, 56 F.3d 450, 459-460 (2nd Cir. 1995) (Petition at 26-27), and *Perales v. Casillas*, 950 F.2d 1066, 1071 (5th Cir. 1992) (Petition at 27), also do not address, let alone hold, that pre-litigation misconduct can form the basis for an inherent authority fee award. Nor does *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (Petition at 27). *Guevara* does no more than state that the four dissenting Justices in *Chambers* "were firmly of the view that bad faith fee shifting may not be used to sanction pre-litigation misconduct." *Id.* at 1503. The majority in *Chambers* was of the same view, concluding that an inherent authority sanction award did not present an *Erie* problem precisely because the sanction award was limited to litigation misconduct, and thus did not encroach on the applicable state law's prohibition against an attorney fee award for the conduct that formed the basis of the claims. 501 U.S. at 53. ("We agree with the Court of Appeals that we do not see how the district court's inherent power to tax fees for that conduct can be made

subservient to any state policy without transgressing the grounds of *Erie* . . . for fee-shifting here is not a matter of substantive remedy but of vindicating judicial authority"). *Accord* 10 Moore's Federal Practice, *supra* § 54.171[2][c][ii] at p. 54-266.

Equally unavailing is the Petition's reliance on *United States ex rel. Yonker Construction Co. v. Western Contracting Corp.*, 935 F.2d 936, 942 (8th Cir. 1991) (Petition at 27) for the proposition that pre-litigation conduct can support an inherent authority attorney fee award. This authority pre-dates *McLarty* and *Lamb*, and *Lamb* expressly held that it was "clarify[ing]" the holding in *Yonker Construction Co.*, and that attorneys' fees for pre-litigation misconduct are non-recoverable. 103 F.3d at 1434. The type of conflict the Court requires before it will grant *certiorari* simply does not exist here. *See generally* Stern, Gressman, Shapiro and Geller, Supreme Court Practice §§ 4.3 and 4.4 (8th ed. 2002).

B.

Chambers also teaches that "when there is bad faith conduct in the course of litigation that could be adequately sanctioned under the Rules [of Civil Procedure or statutes], the court should rely on [them] rather than the inherent power," for inherent power "exist[s] to fill in the interstices." 501 U.S. at 46, 50. Resort to inherent authority should be reserved for circumstances in which "neither the statute nor the Rules are up to the task," *id.* at 50, such as in *Chambers*, where, "much of the bad faith conduct by Chambers . . . was beyond the reach of the Rules; his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court. . . ." *Chambers* also stressed that the inherent authority doctrine cannot be used "as a means of circumventing the clear mandate of a procedural rule." 501 U.S. at 50-51. This is precisely what Judge Posner said, here.

Here, the district court did not explain why, let alone find, that Rule 11 was not "up to the task" of dealing with Lenell's Answer. It merely observed in passing that Rule 11 no longer "had fangs." (R. 122, Ex. 2, 11/19/2001 Tr. 2). But that is very different from *properly finding* that the Rule was inherently inadequate to cure the "harm" caused by the Answer. This attempt to substitute inherent authority for Rule 11 is prohibited by *Chambers* and *Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041 (7th Cir. 1998). That Zapata and the district court – which could have acted *sua sponte,* Rule 11 (c)(1) (A) and (B) to require correction of an improper denial – chose not to invoke the Rule, which would have limited damages to the minimal harm caused by the filing (i.e., less than $20,000.00) did not mean that the Rule was inadequate.

That Rule 11 was adequate to deal with the Answer (R. 4) is clear. Even prior to the Answer, Zapata had begun drafting requests to admit. Lenell's responses to them in November, 1999 were comprehensive and essentially admitted liability. (R. 10; 12 Ex. C-E; 27; 28 at 5-7).[11] The answers formed the basis of the motion for partial summary judgment made early in 2001, which stressed that Lenell had, as a matter of law, admitted $857,796.90 of the $890,243 sought in the Complaint! (R. 1 at 1; R. 27 at 5; R. 28; Tr. 866). The court concluded that these responses acknowledged virtually all the indebtedness.[12] According to Exhibit 4 to Zapata's October 31, 2001 Fee Petition, (R. 101) it incurred $14,580 for discovery related work prior to

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[11] Although Zapata moved to compel certain responses to the requests to admit, there was not a request for sanctions, and the court did not find that sanctions were appropriate. (R. 12). In any event, Rule 37 sanctions would have filled the bill.

[12] The court, *sua sponte*, denied the motion immediately, not because of any dispute about liability, but on the technical ground that Rule 56 did not authorize an appealable, enforceable judgment "for any portion of a claim less than the whole." (R. 55-3 at 2-5).

Lenell's January 2000 discovery responses. Obviously, Rule 11 was adequate to deal with any infraction related to the Answer, and no deficiency in it can justify an award of $550,000 in attorneys' fees covering every facet of the case.

The court's dissatisfaction with the preconditions to Rule 11's applicability – or perhaps its recognition that its and Zapata's failure to have invoked the Rule made it unavailable as a basis for sanctions, *Corley, supra*, 142 F.3d at 1058 – ignored the fact that the Rule's "procedural protections are intended to . . . provide opportunities for parties to avoid sanctions." *Perpetual Securities, Inc. v. Tang*, 290 F.3d 132, 141-42 (2nd Cir. 2002). Zapata's refusal to have invoked either Rule 11 or Rule 37 does not mean there was some "interstice" that could only be filled by an exercise of inherent authority. The only "interstice" in this case was the American Rule. But that is not the kind of gap *Chambers* had in mind.

The circuit courts of appeals have been faithful to this aspect of *Chambers*, and concluded that an inherent authority fee award is only appropriate when the Rules are "not up to the task." *See e.g. United States v. One 1987 BMW 325*, 985 F.2d 655, 661 (1st Cir. 1993) (Petition at 23); *Montrose Med. Group Sav. Plan v. Bulger, supra*, 243 F.3d at 785 (3rd Cir. 2001) (Petition at 24); *Mark Indus. Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 732 (9th Cir. 1995); *Hutchinson v. Pfeil*, 208 F.3d 1180, 1186-87 (10th Cir. 2000).

In fact, in no case cited in the Petition has a court departed from *Chambers*' holding that the inherent authority doctrine may never be employed unless the rules are "not up to the task" of sanctioning the misconduct. In *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124 (2nd Cir. 1998) (Petition at 24), the court concluded that defendant's discovery violations could not be remedied under Rule 37 before entering an inherent authority

award. This was the reason the Second Circuit affirmed: "We affirm the district court's conclusion that the Report and Recommendation, as a whole, constituted a rational judicial effort to speak to the entire problem of the Defendants' discovery and neglect."

In re Weiss, 111 F.3d 1159, 1172 (4th Cir. 1997) (Petition at 24) affirmed an inherent authority sanction award because the "conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address. *Chambers*, 501 U.S. at 51." In *RTC v. Dabney*, 73 F.3d 262, 271 (10th Cir. 1995) (Petition at 25), the court awarded sanctions under the inherent authority doctrine precisely because it concluded that the award – an attorney fee award to the court for the time it wasted on a motion – was not allowable under 28 U.S.C. § 1927. Thus, § 1927 was not up to the task and the court needed to rely on its inherent authority.

In *Pickholtz v. Rainbow Technologies, Inc.*, 284 F.3d 1365 (Fed. Cir. 2002) (Petition at 25), the court concluded the inherent authority doctrine may be an appropriate basis for a sanction award in the case because Rule 37 was not up to the task. In *Pickholtz*, a Rule 37 motion was denied because it only authorizes attorneys' fees and the motion was brought by a pro se litigant. For this reason, Rule 37 was not "up to the task" and the Federal Circuit remanded the case to the district court to consider whether an inherent authority award was appropriate under the circumstances.

In *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1320 (11th Cir. 2002) (Petition at 25), the court affirmed a district court order that censured and reprimanded a lawyer pursuant to the court's inherent powers for having accused another lawyer of having made racially derogatory remarks. The court held that while sanctions may have been possible under various Rules and statutes, the court was free to proceed under its inherent authority because a

court obviously has the authority to "censure" and "regulate" the attorneys who appear before it. Nothing in the opinion suggests that a massive blanket monetary award can be made by a district court in order to circumvent the requirements of Rules 11, 37 or 28 U.S.C. § 1927.

Nick v. Morgan Foods, Inc., 270 F.3d 590, 595, n.2 (8th Cir. 2001) stated in dicta that the Rules do not "replace or foreclose resort to the court's inherent power." It did not state that the inherent authority doctrine can be deployed absent a determination that the Rules "are not up to the task." *In re Mroz*, 65 F.3d 1567, 1576 (11th Cir. 1995) (Petition at 25), *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001) and *Travelers Ins. v. St. Jude Hospital,* 38 F.3d 1414, 1417 (5th Cir. 1994) (Petition at 25) also do not hold that a court can resort to its inherent authority without considering whether the Rules are up to the task. In fact, none of these authorities addressed this issue.

First Bank of Marietta v. Hartford Underwriters Insurance Co., 307 F.3d 501, 517 (6th Cir. 2002) (Petition at 24), which was authored by a district judge, also does not support granting the Petition. *First Bank of Marietta* held that, "[a]lthough *Chambers* states that a district court should consider whether the conduct could be sanctioned under the rules before it relies on its inherent authority . . . We do not interpret *Chambers* to require the district court in every instance to exhaust consideration of sanctions under other relevant rules and/or statutes. . . . We are reluctant to impose a wooden requirement where the district court needs the discretion and flexibility to exercise its inherent authority." 307 F.3d at 513, 514. However, the district court's findings did make clear that the Rules were not up to the task. 307 F.3d at 517. ("First Bank's Rule 11 misconduct is intertwined with its other misconduct that needed to be addressed by the district court's inherent powers"). Thus, the decision represents an inconsistency in dicta, that does not warrant this Court's

review, and a single non-outcome determinative concept from an opinion does not warrant *certiorari*. "An inconsistency in dicta" does not suffice. Stern, Gressman, Shapiro and Geller, *supra,* Supreme Court Practice at § 4.3.

This dicta, as pointed out by Circuit Judge Gilman's dissent, is wrong. First, it represents the only authority that has suggested that the Rules must not always be considered before the court may resort to the inherent authority doctrine. *See* 307 F.3d at 534. Second, constraining district courts by requiring them first to look to the Rules will not impermissibly hamper their discretion. It will only assure that the fee award is no greater than necessary to address the harm created, and that courts do not contravene the federal rules which "have the force of statutes." 313 F.3d at 392.

CONCLUSION

The Petition for *Certiorari* should be denied.

Respectfully submitted,

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UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) (CISG)[1]

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be

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[1] For U.S. citation purposes, the UN-certified English text is published in 52 Federal Register 6262, 6264-6280 (March 2, 1987); United States Code Annotated, Title 15, Appendix (Supp. 1987).

settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after

taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Section III. Interest

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

313 F.3d 385 (7th Cir. 2002)

ZAPATA HERMANOS SUCESORES, S.A.,
Plaintiff-Appellee,

v.

HEARTHSIDE BAKING COMPANY, INC.,
d/b/a Maurice Lenell Cooky Company,
Defendant-Appellant

NoS. 01-3402, 02-1867 and 02-1915.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 13, 2002.

Decided Nov. 19, 2002.

As Amended Dec. 17, 2002.

Javier H. Rubinstein (argued), Mayer, Brown, Rowe & Maw, Chicago, IL, for Plaintiff-Appellee.

Jeffrey N. Cole (argued), Cole & Staes, Chicago, IL, for Defendant-Appellant.

Before POSNER, DIANE P. WOOD, and EVANS, Circuit Judges.

POSNER, Circuit Judge.

Zapata, a Mexican corporation that supplied Lenell, a U.S. wholesale baker of cookies, with cookie tins, sued Lenell for breach of contract and won. The district judge ordered Lenell to pay Zapata $550,000 in attorneys' fees. From that order, which the judge based both on a provision of the Convention on Contracts for the International Sale of Goods, Jan. 1, 1988, 15 U.S.C. App., and on the inherent authority of the courts to punish the conduct of litigation in bad faith, Lenell appeals.

The Convention, of which both the U.S. and Mexico are signatories, provides, as its name indicates, remedies for breach of international contracts for the sale of goods. Zapata brought suit under the Convention for money due under 110 invoices, amounting to some $900,000 (we round liberally), and also sought prejudgment interest plus attorneys' fees, which it contended are "losses" within the meaning of the Convention and are therefore an automatic entitlement of a plaintiff who prevails in a suit under the Convention. At the close of the evidence in a one-week trial, the judge granted judgment as a matter of law for Zapata on 93 of the 110 invoices, totaling $850,000. Zapata's claim for money due under the remaining invoices was submitted to the jury, which found in favor of Lenell. Lenell had filed several counterclaims; the judge dismissed some of them and the jury ruled for Zapata on the others. The jury also awarded Zapata $350,000 in prejudgment interest with respect to the 93 invoices as to which Zapata had prevailed, and the judge then tacked on the attorneys' fees – the entire attorneys' fees that Zapata had incurred during the litigation.

Article 74 of the Convention provides that "damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach," provided the consequence was foreseeable at the time the contract was made. Article 7(2) provides that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law [i.e., conflicts of law rules]." There is no suggestion in the

background of the Convention or the cases under it that "loss" was intended to include attorneys' fees, but no suggestion to the contrary either. Nevertheless it seems apparent that "loss" does not include attorneys' fees incurred in the litigation of a suit for breach of contract, though certain pre-litigation legal expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as "incidental" damages. *Sorenson v. Fio Rito,* 90 Ill.App.3d 368, 45 Ill.Dec. 714, 413 N.E.2d 47, 50-52 (1980); cf. *Tull v. Gundersons, Inc.,* 709 P.2d 940, 946 (Colo.1985); *Restatement (Second) of Contracts* § 347, comment c (1981).

The Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law. For example, the "American rule," that the winner must bear his own litigation expenses, and the "English rule" (followed in most other countries as well), that he is entitled to reimbursement, are rules of general applicability. They are not field-specific. There are, it is true, numerous exceptions to the principle that provisions regarding attorneys' fees are part of general procedure law. For example, federal antidiscrimination, antitrust, copyright, pension, and securities laws all contain field-specific provisions modifying the American rule (as do many other field-specific statutes). An international convention on contract law *could* do the same. But not only is the question of attorneys' fees not "expressly settled" in the Convention, it is not even mentioned. And there are no "principles" that can be drawn out of the provisions of the Convention for determining whether "loss" includes

attorneys' fees; so by the terms of the Convention itself the matter must be left to domestic law (i.e., the law picked out by "the rules of private international law," which means the rules governing choice of law in international legal disputes).

U.S. contract law is different from, say, French contract law, and the general U.S. rule on attorneys' fee shifting (the "American rule") is different from the French rule (loser pays). But no one would say that French contract law differs from U.S. *because* the winner of a contract suit in France is entitled to be reimbursed by the loser, and in the U.S. not. That's an important difference but not a contract-law difference. It is a difference resulting from differing procedural rules of general applicability.

The interpretation of "loss" for which Zapata contends would produce anomalies; this is another reason to reject the interpretation. On Zapata's view the prevailing plaintiff in a suit under the Convention would (though presumably subject to the general contract duty to mitigate damages, to which we referred earlier) get his attorneys' fees reimbursed more or less automatically (the reason for the "more or less" qualification will become evident in a moment). But what if the defendant won? Could he invoke the domestic law, if as is likely other than in the United States that law entitled either side that wins to reimbursement of his fees by the loser? Well, if so, could a winning plaintiff waive his right to attorneys' fees under the Convention in favor of domestic law, which might be more or less generous than Article 74, since Article 74 requires that any loss must, to be recoverable, be foreseeable, which beyond some level attorneys' fees, though reasonable ex post, might not be? And how likely is it that the United States would have signed the Convention had

it thought that in doing so it was abandoning the hallowed American rule? To the vast majority of the signatories of the Convention, being nations in which loser pays is the rule anyway, the question whether "loss" includes attorneys' fees would have held little interest; there is no reason to suppose they thought about the question at all.

For these reasons, we conclude that "loss" in Article 74 does not include attorneys' fees, and we move on to the question of a district court's inherent authority to punish a litigant or the litigant's lawyers for litigating in bad faith. The district judge made clear that he was basing his award of attorneys' fees to Zapata in part on his indignation at Lenell's having failed to pay money conceded to be owed to Zapata. Although the precise amount was in dispute, Lenell concedes that it owed Zapata at least half of the $1.2 million that Zapata obtained in damages (not counting the attorneys' fees) and pre-judgment interest. Lenell had no excuse for not paying that amount, and this upset the judge.

Firms should pay their debts when they have no legal defense to them. *Pacta sunt servanda,* as the saying goes ("contracts are to be obeyed"). In the civil law (that is, the legal regime of Continental Europe), this principle is taken very seriously, as illustrated by the fact that the civil law grants specific performance in breach of contract cases as a matter of course. But under the common law (including the common law of Illinois, which is the law that choice of law principles make applicable to any issues in this case not covered in express terms by the Convention), a breach of contract is not considered wrongful activity in the sense that a tort or a crime is wrongful. When we delve for reasons, we encounter Holmes's argument that practically speaking the duty created by a contract is really just to

perform or pay damages, for only if damages are inadequate relief in the particular circumstances of the case will specific performance be ordered. In other words, and subject to the qualification just mentioned, the entire practical effect of signing a contract is that by doing so one obtains an option to break it. The damages one must pay for breaking the contract are simply the price if the option is exercised. *See* Oliver Wendell Holmes, Jr., *The Common Law* 300-02 (1881); Holmes, "The Path of the Law," 10 *Harv. L.Rev.* 457, 462 (1897).

Why such lenity? Perhaps because breach of contract is a form of strict liability. Many breaches are involuntary and so inapt occasions for punishment. Even deliberate breaches are not necessarily culpable, as they may enable an improvement in efficiency – suppose Lenell had a contract to take a certain quantity of tins from Zapata and found that it could buy them for half the price from someone else. Some breaches of contract, it is true, are not only deliberate but culpable, and maybe this was one – Lenell offers no excuse for failing to pay for tins that it had taken delivery of and presumably resold with its cookies in them. Refusing to pay the contract price after the other party has performed is not the kind of option that the performing party would willingly have granted when the contract was negotiated. The option of which Holmes spoke was the option not to perform because performance was impossible or because some more valuable use of the resources required for performance arose after the contract was signed. Zapata argues, moreover, perhaps correctly (we need not decide), that Lenell refused to pay in an effort to extract a favorable modification of the terms of the parties' dealings, which would be a form of duress if Zapata somehow lacked an effective legal remedy. *Professional*

Service Network, Inc. v. American Alliance Holding Co., 238 F.3d 897, 900-01 (7th Cir.2001); *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 100-04 (9th Cir.1902). But Zapata did not charge duress, and probably couldn't, since it had a good remedy – this suit.

It is true that nowadays common law courts will sometimes award punitive damages for breach of contract in bad faith. But outside the field of insurance, where refusals in bad faith to indemnify or defend have long been punishable by awards of punitive damages to the insured, the plaintiff must show that the breach of contract involved tortious misconduct, such as duress or fraud or abuse of fiduciary duty. *See*, e.g., *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 982-83 (Ind.1993); *Story v. City of Bozeman*, 242 Mont. 436, 791 P.2d 767, 776 (1990); E. Allan Farnsworth, *Contracts* § 12.8, pp. 788-89 (3d ed.1999). This is the rule in Illinois, *Morrow v. L.A. Goldschmidt Associates, Inc.*, 112 Ill.2d 87, 96 Ill.Dec. 939, 492 N.E.2d 181, 183-86 (1986), and Zapata has not tried to come within it. For that matter, it did not ask for punitive damages, and the judge had no authority to award attorneys' fees in lieu of such damages. He could not have awarded punitive damages if Zapata had asked for them but had been unable to prove tortious misconduct by Lenell, and even more clearly he could not award them when they had not been requested.

The decision whether punitive damages shall be a sanction for a breach of contract is an issue of substantive law, and under the *Erie* doctrine a federal court is not authorized to apply a different substantive law of contracts in a diversity case from the law that a state court would apply were the case being litigated in a state court instead. And obviously that rule must not be circumvented

by renaming punitive damages "attorneys' fees." *United States ex rel. Treat Bros. Co. v. Fidelity & Deposit Co. of Maryland,* 986 F.2d 1110, 1119-20 (7th Cir.1993); *see* also *Chambers v. NASCO, Inc.,* 501 U.S. 32, 52-55, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.,* 976 F.2d 541, 548-50 (9th Cir.1992). It is true that this is not a diversity case, but the *Erie* doctrine applies to any case in which state law supplies the rule of decision, *see*, e.g., *O'Melveny & Myers v. FDIC,* 512 U.S. 79, 83-85, 87-88, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994), here by incorporation in the Convention.

The inherent authority of federal courts to punish misconduct before them is not a grant of authority to do good, rectify shortcomings of the common law (as by using an award of attorneys' fees to make up for an absence that the judge may deem regrettable of punitive damages for certain breaches of contract), or undermine the American rule on the award of attorneys' fees to the prevailing party in the absence of statute. *Morganroth & Morganroth v. DeLorean,* 213 F.3d 1301, 1318 (10th Cir.2000); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc., supra,* 976 F.2d at 548-50 (9th Cir.1992); *Shimman v. International Union of Operating Engineers, Local 18,* 744 F.2d 1226, 1232-33 and n. 9 (6th Cir.1984) (en banc). These cases and others we could cite make clear that it is a residual authority, to be exercised sparingly, to punish misconduct (1) occurring in the litigation itself, not in the events giving rise to the litigation (for then the punishment would be a product of substantive law – designed, for example, to deter breaches of contract), and (2) not adequately dealt with by other rules, most pertinently here

Rules 11 and 37 of the Federal Rules of Civil Procedure, which Lenell has not been accused of violating.

Insofar as he focused on Lenell's behavior in the litigation itself, which, to repeat, is the only lawful domain of the relevant concept of "inherent authority" – the authority could not constitutionally be extended to give parties remedies not available to them under the law of the state that furnishes the substantive rules of decision in the case – the judge punished Lenell for having failed to acknowledge liability and spare Zapata and the judge and the jury and the witnesses and so on the burden of a trial. But as it happens, the fault here was in no small measure the judge's. Well before the trial, and long, long before Zapata's lawyers had run the tab up to $550,000, they had moved for partial summary judgment, claiming that Lenell in answer to Zapata's requests for admission had acknowledged liability for $858,000 of the $890,000 sought in the complaint. The judge had denied the motion on the ground that partial summary judgment cannot be granted unless the grant would give rise to an appealable judgment. This was error. Rule 56(d) of the civil rules is explicit in allowing the judge to grant summary judgment on less than the plaintiff's whole claim, and there is no hint of any requirement that the grant carve at a joint that would permit the judge to enter a final judgment under Rule 54(b). If the plaintiff had two separate claims, and the judge granted summary judgment on one and set the other for trial, he could also if he wanted enter final judgment on the first dismissal, enabling the defendant to appeal immediately under Rule 54(b). If instead the plaintiff had as here one claim, and the judge granted it in part, the defendant could not appeal – the conditions of Rule 54(b) would not be satisfied – yet it is evident from

the wording of Rule 56(d) that this would be a proper partial summary judgment, for the rule expressly authorizes an order "specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy." No purpose would be served by confining the rule as the district judge did. If anything, judicial economy is better served by a partial summary judgment that is *not* appealable, since a Rule 54(b) appeal normally interrupts the proceedings in the district court.

Since the challenged award of $550,000 in attorneys' fees cannot stand, we need not pick through the record to see whether some of the counterclaims or other moves by Lenell during the trial were sanctionable apart from Rule 11 and Rule 37. But it may be useful in guiding further proceedings on remand to point out that to the extent that those rules place limits on the award of sanctions under them (for example by the provision of safe harbors in Rule 11), those limitations are equally limitations on inherent authority, which may not be used to amend the rules. *Kovilic Construction Co. v. Missbrenner,* 106 F.3d 768, 772-73 (7th Cir.1997). For federal rules of procedure have the force of statutes. *See id.;* 28 U.S.C. § 2072(b).

One issue remains for discussion. Although we have treated the appeal so far as if the only issues concerned attorneys' fees, Lenell also argues that the jury verdict should be set aside because the judge by his comments in open court signaled to the jury his scorn for Lenell's case. There were only a couple of such comments (many more, however, at sidebars outside the jury's hearing), and we do not think they could have changed the outcome. But we also think that judges should be very cautious about making comments in the hearing of a jury about the

quality of a party's case or lawyers. For if he signals to the jury his opinion as to how the case should be decided, he undermines the jury's authority. *Collins v. Kibort,* 143 F.3d 331, 336 (7th Cir.1998); *Nationwide Mutual Fire Ins. Co. v. Ford Motor Co.,* 174 F.3d 801, 805, 808 (6th Cir.1999); *see* also *Ross v. Black & Decker, Inc.,* 977 F.2d 1178, 1187 (7th Cir.1992).

From what we have just reported about the judge's statements during the trial and from the tone of a number of other statements that he made in the course of this litigation, we think it best that the further proceedings that we are ordering be conducted before a different judge, in accordance with 7th Cir. R. 36.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Supreme Court, U.S.
FILED
MAY 23 '03
OFFICE OF THE CLERK

(4)

No. 02-1318

IN THE
Supreme Court of the United States

ZAPATA HERMANOS SUCESORES, S.A., PETITIONER,

v.

HEARTHSIDE BAKING CO. D/B/A MAURICE LENELL COOKY CO., RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Lenell virtually concedes the certworthiness of this case, which it acknowledges to squarely raise each of the questions presented. Lenell devotes the majority of its opposition to arguing the merits while offering nothing to cast doubt on any of the compelling grounds that warrant Supreme Court review.

A.1. Lenell makes a half-hearted attempt to deny that the Seventh Circuit has created an international split of authority over the recoverability of attorneys' fees under Article 74, insinuating (at 17) that there are only a "handful" of decisions outside the U.S. awarding such fees under Article 74. That is flatly wrong. The Petition cited at least seven decisions holding that "fees in general could be recovered under Article 74" (Pet. 10-11), and the brief of Amici Curiae (at 15-17) catalogues over a dozen more decisions reaching the same conclusion.

Even Lenell's own authorities acknowledge that non-U.S. decisions "appear to award a prevailing litigant compensation for attorneys' fees incurred in the course of the dispute, and they do so not on the basis of a 'loser-pays' principle in the tribunal's own domestic law, but rather on the authority of the damages provisions of the CISG itself." Flechtner, 22 NW. J. INT'L L. & BUS 121.[1] See also Lookofsky, 6 VINDOBONA J. INT'L COMM. L. & ARB. 27 (same). Lenell is also poorly positioned to challenge this consistent line of international authority since Lenell fails to cite a *single decision* anywhere in the world that adopts the Seventh Circuit's contrary view.

Apparently unconvinced by its own position, Lenell (at 3) resorts to asking this Court to simply disregard the decisions of foreign courts because "the Supreme Court has no authority over foreign tribunals." Lenell thus invites the Court to repeat

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[1] Lenell claims (at 20) that a recent article by Professor Vanto "agrees that Judge Posner's decision was correct!" Notably, however, Professor Vanto himself is one of the authors of the Brief of Amicus Curiae International Association of Contract and Commercial Managers and the Institute of International Commercial Law of the Pace University School of Law in *support* of Zapata and in urging this Court to grant the petition.

the very error committed by the court of appeals by disregarding the clear command of CISG Article 7, which requires courts to consider the decisions of other signatory nations to foster the legal uniformity for which the CISG was created. Pet. 9. In short, the international conflict created by the court of appeals is undeniable, and the need to address it equally compelling.

2. Lenell also repeatedly mischaracterizes the question presented as whether Article 74 should be construed as a fee-shifting statute where the "loser" automatically pays. But that is *not* what the district court held; it merely ruled that attorneys' fees may be recovered under Article 74 where, as here, those fees qualify as "foreseen consequential damages." Pet. App. 16a. Incredibly, Lenell ignores this foreseeability component of the question presented (and of Article 74) completely. Lenell thus would have the Court believe that reversal would result in attorneys' fees being automatically awarded in every case. That is simply not so.

As the petition makes clear (at 17), Article 74 is *not* a fee-shifting statute. The question here is whether attorneys' fees may be recovered as *damages* when Article 74's foreseeability requirements are met, just like any other form of consequential loss. In this case, that recovery is compelled by the plain language of Article 74 because it is *undisputed* that Zapata's attorneys' fees meet the foreseeability requirements of Article 74. Lenell stipulated to precisely that. Pet. App. 16a.

Article 74 broadly provides for recovery of *all* "loss[es] which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract * * * as a possible consequence of the breach of contract." Pet. App. 36a. It is also undisputed that Article 74 contains no exclusion of attorneys' fees or any other form of loss from its scope. As the Austrian Supreme Court has held, "a claim for damages [under Article 74] is only limited by the foreseeability of the loss for the party in breach." Pet. 15. Accord *Delchi*, 71 F.3d at 1030. As such, the recoverability of *any* loss under Article 74 depends entirely on

its foreseeability. Moreover, as the Second Circuit held in *Delchi*, Article 74 requires placing "the aggrieved party in as good a position as if the other party had properly performed the contract." 71 F.3d at 1029. As the district court below properly held, "that result is assured only by freeing [a] damages recovery from the burden of attorneys' fees." Pet. App. 17a. Lenell does not deny that.

Lenell points (at 13) to the absence of any reference in the CISG legislative history to the recovery of attorneys' fees. That silence, however, fatally undermines Lenell's reading of Article 74 because it confirms that the framers of the CISG never intended to carve out of Article 74 (as the Seventh Circuit now has) an exception precluding the recovery of attorneys' fees as damages regardless of their foreseeability.

3. In the petition, Zapata also demonstrated that the Seventh Circuit disregarded the clear requirements of CISG Article 7. Lenell notably does not contest this. In fact, Lenell never even *attempts* to argue that the Seventh Circuit complied with Article 7. Article 7(1) requires signatory courts to interpret the CISG with regard for "its international character and * * * the need to promote uniformity in its application and the observance of good faith in international trade." Article 7(2) also requires that any questions "not expressly settled" by the CISG "are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." It is undisputed that the Seventh Circuit did none of these things. It never cited to any CISG decision abroad, and it completely ignored the general principles of the CISG. This was reversible error, particularly because, as the district court held, the general principles of the CISG strongly support the recovery of attorneys' fees in cases such as this to provide the plaintiff with a full recovery. Pet. App. 16a-17a. See also Pet. 18-19; Br. Amicus Curiae 14-18. Lenell does not contend otherwise.

It is also apparent that the Seventh Circuit violated Article 7 by construing Article 74 according to principles of domestic law, *i.e.*, the "American rule" of attorneys' fees. Lenell tries to deny (at 11) that the Seventh Circuit "was construing CISG by using domestic law." But it is obvious that the court of appeals did exactly that by interpreting the meaning of "loss" in Article 74 *solely* on the basis of domestic cases to hold that "'loss' does not include attorneys' fees incurred in the litigation of a suit for breach of contract." Pet. App. 2a. Even Lenell now relies on domestic law when it argues that attorneys' fees should not be recoverable under Article 74 because they are not available under the U.S. version of the UCC. Lenell forgets that the only reason attorneys' fees are not recoverable under the UCC is that the *American rule* forbids their recovery absent express statutory authority, and *disavows* "the need to provide full compensation." *Summit Valley Indus., Inc.* v. *United Bhd. of Carpenters*, 456 U.S. 717, 725 (1982). The American rule thus irreconcilably conflicts with the general principles of the CISG.

Lenell also does not deny that the Seventh Circuit's reliance on domestic law conflicts with decisions of other circuits that properly have refused to apply principles of domestic law to interpret the CISG. See Pet. 13-14. Indeed, as the brief of amici curiae confirms (at 3-5), there is pervasive confusion among the federal courts as to the role that domestic law should play in CISG cases. This case can put that controversy to rest.

4. Lenell tries to defend the Seventh Circuit's reliance on domestic law by arguing that the recoverability of attorneys' fees under Article 74 should be treated as a procedural question left by the CISG to domestic law. But that is plainly wrong. As Lenell concedes, resolution of the question presented here turns upon the meaning of terms *expressly used* in Article 74. Their meaning is necessarily a question of substance that must be governed by the CISG itself. Indeed, Lenell never explains how the meaning of CISG terms could possibly be a procedural question to be governed by 62 different sets of domestic laws. Whether or not attorneys fees are a recoverable form of "loss"

under Article 74, there can only be one answer to that question, and it surely cannot be governed by domestic law.

Lenell's insistence on treating the question presented as procedural also reflects a basic misunderstanding of the distinction between the *automatic* shifting of fees in all cases—a procedural question governed by domestic law—and the recovery of attorneys' fees as *damages* under Article 74 where their foreseeability must be proven on a case-by-case basis— a substantive question governed by the CISG. As amici explain (at 14), this distinction is firmly grounded in the CISG's jurisprudence. For instance, the decision of the German Court of Appeals in Dusseldorf (discussed at Pet. 10) (which Lenell also features, at 17) awarded the plaintiff certain of its attorneys' fees pursuant to domestic procedural law, but ruled that the remaining attorneys' fees, which were not awardable domestically, were recoverable under Article 74 as *damages*.

Lenell's complaint that the recovery of attorneys' fees under Article 74 would produce anomalous results is also easily refuted when one considers that attorneys' fees would only be recoverable as damages. It is hardly anomalous that only a plaintiff (or counter-plaintiff) would be able to recover damages. After all, that is how lawsuits work. Likewise, Lenell's concern that it would be procedurally difficult to award fees as damages because they cannot be assessed until the end of the case is illusory because the question of fees can easily be bifurcated, just as occurred below and is routinely done in fee-shifting cases.

5. In short, Lenell casts no doubt on the compelling need for Supreme Court review. If anything, Lenell confirms the international controversy that has surrounded this case. As amici curiae demonstrate, there is a great need for this Court to clarify the proper methodology for construing the CISG. It is also critically necessary to resolve the meaning of Article 74, which serves as the most important remedial provision in the CISG. As amici explain (at i), the supreme courts of other CISG signatories repeatedly have contributed their guidance to foster a common

understanding of the CISG. The United States stands as a notable exception. This case provides an important opportunity to remedy that silence.[2]

B.1. Lenell ignores the district court's findings of bad faith that supported its sanction of Lenell. Lenell suggests that the district court imposed sanctions merely for "stiffing" a creditor and nothing more. That is sheer nonsense. What the district court found was that Lenell engaged in "extreme bad faith" not only by refusing to pay an indisputable debt, but by then misusing the judicial process to "make it as difficult and expensive as possible for Zapata to receive its money in this litigation." Pet. App. 21a. The court *specifically* found that Lenell carried out its scheme by "dramatically and needlessly expanding the scope of this litigation" and "interposing a host of unwarranted roadblocks" through "late-advanced, convoluted, multifarious and (regrettably) baseless defenses and counterclaims." *Id.* at 20a-22a, 23a, 25a. Lenell concocted dozens of frivolous defenses and counterclaims that Zapata could only refute through prolonged and expensive discovery, claiming that Zapata caused it to pay customer fines that never existed, denying receipt of shipments it actually received, claiming damages for shipments that had nothing to do with Zapata, and claiming late delivery of orders that were never placed. Throughout the litigation, Lenell invented more than 100 of these defenses and counterclaims, thereby (as the district court found) "dragging out what should have been a relatively simple collection case for goods sold and delivered * * * into an enormously time-consuming and expensive lawsuit." *Id.* at 23a. Incredibly, Lenell *never* mentions these findings. The inescapable fact nevertheless remains, though, that the court's findings of pervasive bad faith easily supported its sanction.

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[2] Lenell points to the relative paucity of federal decisions construing the CISG as a reason to deny certiorari. In fact, as the Pace University CISG database (Pet. 7 n.2) confirms, many CISG cases are decided by international arbitration, which typically does not result in published decisions.

2. In the face of nine circuits espousing a rule contrary to that of the Seventh Circuit below, Lenell denies that there is a circuit split over whether federal courts have the inherent power to sanction bad faith conduct that is otherwise sanctionable by statute or rule. It also claims that this question was settled by *Chambers* despite the circuits' wildly varying interpretations of this Court's decision. See Pet. 25. Lenell conveniently avoids the ambiguity in *Chambers* by carefully editing the Court's language. In fact, Lenell misquotes *Chambers* twice in one sentence: Lenell writes that "*Chambers* also teaches that 'when there is bad faith conduct in the course of litigation that could be adequately sanctioned under the Rules [of Civil Procedure or statutes], the court should rely on [them] rather than the inherent power,' for inherent power 'exist[s] to fill in the interstices.' 501 U.S. at 46, 50." Br. in Opp. 25 (alterations in original). Lenell *omits* the critical word "ordinarily" from the quotation, the very source of much of the present confusion in the circuits. Second, this Court did *not* hold that the inherent power doctrine "exist[s] to fill in the interstices." What the Court said was that:

> "We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. * * * [T]he inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to fill in the interstices."

501 U.S. at 46. Read in context, it is clear that *Chambers* presented, but did *not* settle, the question this case now raises.

3. Lenell also claims that the circuits are united in holding that inherent power sanctions may not be imposed unless the court finds that rules and statutes are "not up to the task." Br. in Opp. 26.[3] It cites four cases, two of which the petition cited (at 23-24) as reflecting the minority views of the First and Third

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[3] Lenell wrongly argues (at 26) that the district court could have invoked Rule 11 *sua sponte* to award attorneys' fees; in fact, imposition of *sua sponte* sanctions can *not* include the award of attorneys' fees. See Rule 11(c)(2)(A).

Circuits, see *United States* v. *One 1987 BMW 325*, 985 F.2d at 661; *Montrose Med. Group Sav. Plan* v. *Bulger*, 243 F.3d at 785, and two of which imposed no requirement at all that the rules be "up to the task." See *Mark Indus. Ltd.* v. *Sea Captain's Choice, Inc.*, 50 F.3d 730 (9th Cir. 1995); *Hutchinson* v. *Pfiel*, 208 F.3d 1180 (10th Cir. 2000).

Zapata certainly does not deny the existence of the minority view of the First, Third, and Seventh Circuits. To the contrary, that view forms a basic element of the circuit split described in the Petition. But Lenell is plainly wrong to deny the existence of the majority view adopted by nine circuits that a court *may* impose sanctions under its inherent power regardless of whether a rule or statute would apply to that conduct. See Pet. 23-24. In fact, Lenell's miscitation of these cases is astonishing.

Zapata cannot in the space of this reply brief refute each mischaracterization of the cases that comprise the majority rule. The cases will speak for themselves. A few examples, though, are in order. For instance, Lenell tries to duck *Fink* v. *Gomez*, 239 F.3d 989, 994 (9th Cir. 2001), by falsely arguing that *Fink* did not "hold that a court can resort to its inherent authority without considering whether the Rules are up to the task" and that *Fink* had not even "addressed this issue." Br. in Opp. 29. In fact, the district court in that case imposed sanctions under its inherent power without considering Rule 11 or § 1927. 239 F.3d at 991. On appeal, the appellant specifically argued (as Lenell does) that "the district court erred in basing its decision on inherent authority and declining to consider sanctions available under Rule 11 or 28 U.S.C. § 1927." *Id.* at 994. The Ninth Circuit disagreed: "[i]t is well settled * * * that the district court may, in its informed discretion, rely on inherent power rather than the federal rules or § 1927." *Id.* Thus, the court rejected the very argument that Lenell claims was not even "addressed."

Lenell also falsely claims (at 28) that *RTC* v. *Dabney*, 73 F.3d 262 (10th Cir. 1995), "awarded sanctions under the inherent authority doctrine precisely because it concluded that the

award—an attorney fee award to the court for the time it wasted on a motion—was not allowable under 28 U.S.C. § 1927. Thus, § 1927 was not up to the task and the court needed to rely on its inherent authority." In fact, the district court and Tenth Circuit both held that the conduct *was* sanctionable under § 1927, but nevertheless upheld the entire sanction "under the court's inherent power." *Id.* at 265, 267.

Lenell also ignores the holdings of the remaining cases that comprise the majority view rejected by the Seventh Circuit. For instance, in *Pickholtz,* 284 F.3d at 1377, the Federal Circuit squarely held that "*Chambers* * * * permits, indeed requires, the court to separately consider [a] motion for attorney fees under its inherent power, which is an independent basis for assessing sanctions, one not preempted by Rule 37." Lenell also disregards the Eleventh Circuit's holding in *Thomas* v. *Tenneco Packaging*, 293 F.3d at 1320, that the inherent power "'can be invoked even if procedural rules exist which sanction the same conduct'" (quoting *Chambers*). And in *First Bank of Marietta* v. *Hartford Underwriters Ins. Co.*, 307 F.3d at 510, the appellant argued, just as Lenell does, "that because Rule 11 could have dealt with the questions of sanctions * * * the district court abused its discretion by awarding [appellee] attorney fees based on its inherent powers." The Sixth Circuit disagreed: "Even if there were available sanctions under statutes or various rules in the Federal Rules of Civil Procedure, the Supreme Court in *Chambers* emphasized that the inherent authority of the Court is an independent basis for sanctioning bad faith conduct in litigation." *Id.* at 511. Contrary to Lenell's claim, the court flatly *rejected* the notion that inherent power sanctions may only be imposed where rules are "not up to the task": "[t]his Court has affirmed the imposition of sanctions under the district court's inherent authority where the district court did not expressly consider particular rules of civil procedure." *Id.* at 513. The Sixth Circuit also recognized the circuit split over the meaning of *Chambers* (*id.*)—the very circuit split whose existence Lenell now pretends not to exist.

4. Lenell also tries to explain away the circuit split over whether courts can consider pre-litigation conduct in sanctioning bad faith pursuant to their inherent power. It does so by dodging the issue, recasting it as whether courts can sanction purely pre-litigation conduct. But that is not the question presented. What the Seventh Circuit held was that the district court could not sanction conduct "giving rise to the litigation" even if that conduct was directly related to sanctionable conduct *during* the litigation—which is precisely what the district court found. Pet. App. 7a-8a, 20a-22a, 23a, 25a. On this score, other circuits clearly disagree. For example, Lenell itself cites (at 24) the Eighth Circuit's decision in *Lamb Engineering*, which "adopted the view *promulgated by various circuits* that, in determining whether to award attorney fees based on the litigant's bad faith, '[t]he court may consider conduct both during and prior to the litigation, although the award may not be based solely on the conduct that led to the substantive claim.'" 103 F.3d at 1435

Lenell also claims (at 24) that "*Sussman v. Bank of Israel*, 56 F.3d 450, 459-460 (2d Cir. 1995) (Petition at 26-27) * * * do[es] not address, let alone hold, that pre-litigation misconduct can form the basis for an inherent authority fee award." That again is false. The sanctions in *Sussman* were based largely upon pre-litigation letters written by the sanctioned party. 56 F.3d at 455. The Second Circuit *specifically* held that "[w]hile Rule 11 extends only to papers filed with the court, the court's inherent power is broader and would permit the court to impose sanctions on the basis of related bad-faith conduct prior to the commencement of the litigation." *Id.* at 459 (citing *Chambers*). In short, the circuit splits described in the petition over the limits of the inherent power doctrine and the meaning of *Chambers* are both very real and irreconcilable. The petition should be granted to resolve these important questions once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 02-1318

In the Supreme Court of the United States

ZAPATA HERMANOS SUCESORES, S.A.,

Petitioner,

v.

HEARTHSIDE BAKING CO. d/b/a MAURICE LENELL COOKY CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL ASSOCIATION OF CONTRACT AND COMMERCIAL MANAGERS AND THE INSTITUTE OF INTERNATIONAL COMMERCIAL LAW OF THE PACE UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

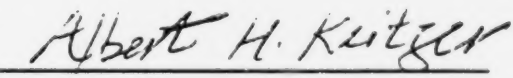
The International Association of Contract and Contract and Commercial Managers ("IACCM") and the Institute of International Commercial Law of the Pace University School of Law respectfully move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file a brief *amicus curiae* in support of petitioner. The consent of counsel for petitioner has been granted; the consent of counsel for respondent has been sought but not obtained.

Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co. d/b/a Maurice Lenell Cooky Co. is a proceeding that centers around a uniform law on international trade. The Zapata rulings of the District Court and Circuit Court of Appeals have elicited diverse views by persons from many parts of the world.

IACCM, a not-for-profit corporation, is an association of professional businesspersons engaged in international trade who represent more than 400 corporations in over 80 countries. The Pace Institute is a university learning center devoted to international trade and the uniform international sales law that is the subject of the *Zapata* proceeding. Educators, practicing attorneys and jurists associated with the Institute have written over 400 books, monographs and law journal articles on this law.

IACCM and the Institute believe that an opportunity to consider their views can be of help to the Court in its determination whether or not to grant certiorari.

Respectfully submitted,



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REASONS WHY THE COURT SHOULD RULE ON THE *ZAPATA* CASE

I. The *Zapata* case calls for interpretation of the world's most important uniform international sales law. It is the uniform law of countries that account for over two-thirds of all world trade.

II. The uniform international sales law of the United States and sixty-one sister signatories (most of the U.S.'s major trading partners) requires autonomous interpretation, within its four corners: (1) text of the law, drawing as appropriate from its (2) travaux préparatoires (legislative history), (3) doctrine (scholarly writings), and (4) jurisprudence (case law).

The Seventh Circuit Court of Appeals has resorted to domestic law to interpret uniform international sales law. Similar error that the Supreme Court can correct is present in decisions of other U.S. Circuit Courts of Appeal and District Courts.

III. Uniform law requires regard for foreign and domestic precedents as uniform law precedents. U.S. courts operate within the framework of a domestic *jurisconsultorium* for the Uniform Commercial Code; so too are courts of sister signatories expected to operate within the framework of a global *jurisconsultorium* for uniform international sales law.

The Seventh Circuit has failed to do so. Similar error that the Supreme Court can correct is present in decisions of other U.S. Circuit Courts of Appeal and District Courts.

IV. Supreme Courts of sister signatories have been heavily involved in reviews of uniform international sales law proceedings. They have handed down eighty-five rulings on this law. A United States Supreme Court ruling on the *Zapata* case will benefit the U.S. and world trade community. It can serve as a template for rulings on all uniform international sales law proceedings by all courts.

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INTERESTS OF THE AMICI CURIAE[1]

The International Association of Contract and Contract and Commercial Managers represents practicing professionals from more than 400 international corporations in over 80 countries—through its electronic library, its global web-based training programs, its international professional certification, its global conferences and provision of news and information to more than 8,000 professional negotiators, contract managers and in-house counsel. The Officers and Members of the Board of the Association (listed at <http://www.iaccm.com>) represent firms that are impacted on a daily basis by the uncertainties and risks of international law. The Association petitions because it is of clear advantage that business should have an internationally available standard as an alternative to the current national codes and that this standard has been recognized and adjudicated at the highest levels; to this end, there is today no court of greater significance than the United States Supreme Court. The Institute of International Commercial Law of the Pace University School of Law shares knowledge on uniform international sales law <http:// cisgw3. law. pace. edu>. Officers, Fellows and Members of the Board of the Institute have written 477 books, monographs and law journal commentaries on the uniform international sales law. The Institute petitions the Supreme Court in support of added certainty in uniform international commercial law.

EXECUTIVE SUMMARY

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a treaty. The United States Constitution provides for the supremacy of treaties. The States

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[1] This brief was not written in whole or in part by any party and no one other than the amici made a monetary contribution to its preparation. Counsel for the Petitioner has provided written consent, a copy of which has been filed with the clerk. Counsel for Respondent has withheld consent.

Party to this Convention have covenanted with one another that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." Article 7(1) CISG. In disregard of this, the Seventh Circuit has preempted the CISG (and the supremacy clause of the U.S. Constitution) in favor of domestic "procedural" law, and turned to the UCC to interpret the CISG. In so doing, that court has followed a pattern laid down by other U.S. courts that have ignored relevant non-U.S. case law and erroneously looked to U.S. domestic UCC case law to interpret the uniform international sales law. The Seventh Circuit and other U.S. courts that have so ruled turn the precepts of Article 7(1) CISG upside down. They are in conflict with courts of sister signatories to the uniform law.

The *Zapata* case offers the Supreme Court a unique opportunity to correct U.S. judicial errors and rule on a proceeding of national and international significance in a manner that puts the U.S. judiciary in the forefront of guidance to the bar and bench and the business community:

- On the proper interpretation of uniform international sales law: autonomously, within its four corners; and
- On attention to relevant case law: comity to foreign decisions much the same as U.S. courts give comity to interpretations of the UCC in sister states. Drawing on the positive experience of the U.S. judiciary with uniform-law case law under the UCC, the U.S. Supreme Court is well postured to lead the global *jurisconsultorium* on the CISG.

PRESENTATION

I. INTRODUCTION

A. The world has a uniform international sales law (CISG) that holds much promise.

"Questions often arise as to whether our law or foreign law governs the transaction, and our traders and their counsel find it difficult to evaluate and answer claims based on one or another of the many unfamiliar foreign legal systems. The Convention's uniform rules offer effective answers to these problems.

"Enhancing legal certainty for international sales contracts will serve the interests of all parties engaged in commerce by facilitating international trade. I recommend that the Senate of the United States promptly give its advice and consent to the ratification of this Convention."

President Ronald Reagan in Letter to the Senate.[2]

"We believe that the Convention represents an important step forward in establishing fair, predictable, and universal principles to govern international sales transactions."

Mark R. Joelson on behalf of the ABA.[3]

B. The promise of the Convention has not been achieved in the U.S.

U.S. businesses support the Uniform Commercial Code because it reduces costs, improves efficiency and makes their country more of a common market. In a similar vein, businesses have recorded their support for the CISG because it

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[2] United States Senate, 98th Congress, 1st Session, Treaty Doc. No. 98-1.

[3] United States Senate Treaty Document 98-9, April 4, 1984, S. Hrg. 98-837 at 26.

can reduce costs, improve efficiency and make the world an increasingly unified market.[4]

U.S. courts have not been as supportive. Members of the U.S. Bar have misunderstood the CISG,[5] as have a number of U.S. courts.[6] Courts and traders have benefited from rulings on the CISG by Supreme Courts of many countries.[7] The world trade community has not yet had the opportunity to benefit from guidance on the uniform international sales law by the

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[4] "[M]any of the most important business associations have gone on record" as supporting the Convention, including "corporation counsel of some of the largest and most important corporations in the United States." The Convention "has the support of the National Foreign Trade Council . . . . The American Arbitration Association has indicated that the Convention would facilitate the settlement of disputes because of the removal of evidentiary problems and proof of foreign law. The U.S. Council for International Business has supported the Convention. The International Trade Policy Committee of the National Association of Manufacturers has supported U.S. ratification of the Convention. There are others. . . . " U.S. Senate Treaty document, *supra* note 2 at 15.

[5] See William S. Dodge, *Teaching the CISG in Contracts*, 50 J. Legal Educ. 72-94 (2000).

[6] Rulings of U.S. District courts of the Southern District of New York, the Northern District of Illinois, the Northern District of California, and of U.S. Courts of Appeal for the Second and Fourth **Circuits contain errors similar to those present in the ruling of the Seventh Circuit Court of Appeals in the *Zapata* case.** The District Court cases are *Helen Kaminski, Calzaturificio Claudia, Mitchell Aircraft Spares*, and *Supermicro Computer*; the Circuit Court cases are *Delchi Carrier* and *Schmitz-Werke*. See *infra* notes 15-20. There have, however, also been well reasoned U.S. rulings on the CISG. *MCC-Marble* and *Asante* prominent examples. *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova*, 144 F3d 1384, and *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F.Supp.2d 1142.

[7] Recognizing the importance of the CISG, **Supreme Courts of other countries have frequently corrected errors on the part of their lower courts.** They have ruled on the CISG more than eighty-five times. See <http://cisgw3.law.pace.edu/cisg/text/casecit.html>.

U.S. Supreme Court. The *Zapata* case presents an excellent opportunity for such guidance.

II. THE *ZAPATA* CASE

The Seventh Circuit has ruled contrary to the United States Constitution, failed to respect the interpretive mandate of the uniform international sales law (Article 7 CISG), and disregarded established practice U.S. Supreme Court practice (consideration of relevant case law).

A. The United States Constitution

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

The CISG is a Treaty. Judges are bound by its provisions, any Thing in other Laws to the Contrary notwithstanding. The *Zapata* case turns on whether attorneys' fees are damages. The CISG sets forth its rules on damages, Article 74. Contrary to the U.S. Constitution, the Seventh Circuit has called upon other U.S. law to preempt these rules.

B. The interpretive mandate of the uniform law

When interpreting a law, one looks to *its* terms, not the terms of some other law. When considering damages under the CISG, the Seventh Circuit instead characterizes damages in terms of another law, referring to "incidental" damages, a UCC term that is not encountered in the CISG.

CISG Article 7(1) states: *"In the interpretation of this Convention, regard is to be had to its international character*

and to the need to promote uniformity in its application and the observance of good faith in international trade." This is a mandate to interpret the CISG autonomously, within its four corners:[8] (1) Text of the law; (2) Travaux préparatoires: legislative history; (3) Doctrine: scholarly writings; (4) jurisprudence: case law.

C. The four corners of the uniform law

(1) The text of the law. Article 74 CISG contains the Convention's general rule on damages: *"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract in the light of the facts and matters of which he then knew our ought to have known as a possible consequence of the breach of contract."*

The CISG aspect of the *Zapata* case turns on whether this provision of the uniform law regards attorneys' fees as damages. For Article 74 to be so regarded, one must determine whether retention of counsel is foreseeable as a consequence of the breach of contract where a buyer does not honor a payment obligation and whether attorneys' fees are "a loss suffered . . . as a consequence of the breach." The parties

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[8] For general comments on the four-corners mandate, see Bruno Zeller, *The Development of Uniform Laws—A Historical Perspective*, 14 Pace Int'l L. Rev. 163-167 (2002), and *Four Corners—The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*, <http://cigw3.law.pace.edu/cisg/biblio/4corners.html>. For an illustrative application to another CISG remedy, see Erika Sondahl, *Understanding the Remedy of Price Reduction: A Means to Fostering a More Uniform Application of the United Nations Convention on Contracts for the International Sale of Goods*, (2003), <http://cisgw3.law.pace.edu/cisg/biblio/sondahl.html>.

to the *Zapata* case stipulated that [buyer] foresaw or should have foreseen that if [buyer] failed to pay for the tins that it ordered, received and accepted, [seller] would incur litigation costs including attorneys' fees to seek payment of the invoices for said tins."[9]

(2) Legislative history. The CISG has a rich and voluminous legislative history, including material presented in ten volumes of UNCITRAL Yearbooks and in Records of the Diplomatic Conference at which this Convention was promulgated.[10]

(3) Doctrine and (4) jurisprudence. There is much scholarly writing on this law. The Institute of International Commercial Law provides an Internet bibliography that cites over 5,000 such writings on the CISG.[11] Tribunals of many countries have ruled on the CISG. There are over 1,000 such cases,[12] including over 300 judicial and arbitral rulings having to do with damages under CISG Article 74.[13]

D. Case law and doctrine

The U.S. Supreme Court has stated that "the opinions of our sister signatories [to an international convention] are to be

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[9] *Zapata Hermanos v. Hearthside Baking Co*, 2001 WL 1000927 (N.D. Ill.).

[10] This material may be accessed by drawing upon the Internet site of the Institute <http://cisgw3.law.pace.edu>.

[11] See <http://cisgw3.law.pace.edu/cisg/biblio/full-biblio.html>.

[12] See <http://cisgw3.law.pace.edu/cisg/text/anno-art-74.html>.

[13] See <http://cisgw3.law.pace.edu/cisg/text/casecit.html>.

entitled to considerable weight."[14]

This is not the approach taken by the Seventh Circuit, nor has this approach been followed by other U.S. courts which have instead stated in error—in [1995] [1997] [1998] [2001] [2002]—that: "There is virtually no case law under the Convention" *Delchi*, a Second Circuit ruling on damages under the CISG; "There is little to no case law on the CISG" *Kaminski*, Southern District, New York; "The case law interpreting and applying the Convention is sparse" *Calzaturificio Claudia*, Southern District, New York; "There is virtually no case law under the Convention" *Mitchell Aircraft*, Northern District. Illinois; "The case law interpreting and applying the CISG is sparse" *Supermicro Computer*, Northern District, California; "Case law interpreting the CISG is rather sparse" *Schmitz-Werke*, Fourth Circuit.[15]

U.S. Circuit and District Courts have also stated that it is appropriate to draw on U.S. domestic law to interpret the CISG.[16] The Seventh Circuit *Zapata* court similarly cites no CISG case law and draws instead on U.S. domestic UCC case

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[14] *Air France v. Saks*, 470 U.S. 392, 404 (1985)..

[15] *Delchi v. Rotorex*, 71 F.3d 1024 (2nd Cir. 1995); *Helen Kaminski v. Marketing Australian Products*, 1997 U.S. Dist. Lexis 10603 (S.D. NY); *Calzaturificio Claudia v. Olivieri Footwear*, 1998 U.S. Dist. Lexis 4586 (S.D. NY); *Mitchell Aircraft Spares v. European Aircraft Service*, 25 F.Supp.2d 915 (N.D. Ill.); *Supermicro Computer v. Digitechnic*, 2001 U.S. Dist. Lexis 7620 (N.D. Cal.); *Schmitz-Werke GmbH v. Rockland Industries*, 2002 WL 1357095 (4th Cir.).

[16] See Delchi, *supra* note 15 ("Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ('UCC') may . . . inform a court where the language of the relevant CISG provision tracks that of the UCC . . ."); Calzaturificio Claudia, *supra* note 15 ("Caselaw interpreting Article 2 of the Uniform Commercial Code ('UCC') may be used to interpret the CISG where the provisions in each statute contain similar language . . ."); Schmitz-Werke, *supra* note 15 ("Case law interpreting provisions of Article 2 of the Uniform Commercial Code that are similar to provisions in the CISG can . . . be helpful in interpreting the Convention").

law to interpret the CISG. This conflicts with rulings by courts of sister signatories.[17]

The Seventh Circuit similarly cites U.S. doctrine—the Restatement of Contracts—but no CISG doctrine in support of its interpretation of the CISG.

III. THE TEMPLATE

The template for the *Zapata* case, for every CISG case, is: Courts should draw on interpretations of the CISG, not domestic laws and domestic restatements; The CISG should be interpreted autonomously, by looking to its four corners.

Attorneys' fees is the CISG issue. Most countries follow a "loser pays" doctrine; the U.S. generally does not. The petitioner in the *Zapata* case sought from the losing party compensation for attorneys' fees incurred. The District Court granted this relief in accordance with Article 74 CISG and for other reasons.[18] The Seventh Circuit Court of Appeals reversed the District Court.

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[17] Courts of sister signatories state that provisions of domestic law "are as a matter of principle inapplicable for the interpretation of the CISG." *Bundesgerichtshof* [Federal Supreme Court of Germany], 3 April 1996, available at <http://cisgw3.law.pace. edu/ cases/ 960403g1.html>. "The CISG requires uniform interpretation on the grounds of its multilaterality, whereby special regard is to be had to its international character (Art. 7(1) CISG. It is therefore to be interpreted autonomously, not from the perspective of the national law of the forum." Switzerland, *Richteramt* [District Court] Laufen, Canton Berne, 7 May 1993, available at <http://cisgw3.law.pace.edu/cases/930507s1.html>. The need to take into account the CISG's international character obliges one to interpret the CISG autonomously and not in the light of any domestic law. Switzerland, *Handelsgericht* [Commercial Court] Aargau, 19 December 1997, available at <http://cisgw3.law.pace. edu/cases/971219s1.html>.

[18] Zapata, *supra* note 9, and *Zapata Hermanos v. Hearthside Baking*, 313 F.3d 385 (2002).

The *Zapata* case is of high interest. Commentaries have been written on it from the United States, Denmark, Finland, Germany and Australia.[19] Others are in process.

(1) Text and issues. *"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."* CISG Article 74, sentence one. This text must be assessed in the light of its legislative history, doctrine and case law. The issues are:

- Does "loss, including loss of profit, suffered . . . as a consequence of the breach" mean "full compensation"? If so:
- Does "full compensation" include recovery of foreseeable attorneys' fees when set at a reasonable rate? If so:

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[19] SUPPORTIVE OF DISTRICT COURT OPINION. Peter Schlechtriem, *Attorneys' Fees as Part of Recoverable Damages*, 14 Pace Int'l L. Rev. 203 (2002) and Praxis des Internationalen Privat- und Verfahrensrechts (May 2002); John Felemegas, *The Award of Counsel Fees Under Article 74 CISG in Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 6 Vindobona J. Int'l Com. L. & Arb. 30-39 (2002). OPPOSED TO DISTRICT COURT OPINION. Harry M. Flechtner, *Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on Zapata Hermanos Sucessores, S.A. v. Hearthside Baking Co.*, 22 Nw. J. Int'l L. & Bus. 121-159 (2002); Joseph Lookofsky, *Zapata Hermanos v. Hearthside Baking*, 6 Vindobona J. Int'l Com. L. & Arb. 27 (2002). CRITICAL OF DISTRICT COURT AND CIRCUIT COURT OPINIONS. Jarno Vanto, *Attorneys' Fees as Damages*, (2003), available at <http://cisgw3.law.pace.edu/cisg/biblio/ vanto1.html>. OPPOSED TO CIRCUIT COURT OPINION. John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, (December 2002), available at <http://cisgw3.law.pace.edu/cisg/biblio/ felemegas1.html>. SUPPORTIVE OF CIRCUIT COURT OPINION. Harry M. Flechtner & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 Vindobona J. Int'l L. & Arb. 93-104 (2003).

- Does domestic procedural law or another theory of law preclude or preempt such an application of the CISG to attorneys' fees? If so:
- Is the basis for preclusion or preemption the CISG or is there another basis for such preclusion or preemption?

*(2) **Legislative history.*** The CISG template should refer to the legislative history of the uniform law to the extent relevant to the issues addressed. The Seventh Circuit opinion does not refer to the CISG's legislative history. The fount of Article 74 CISG is Article 82 ULIS, an antecedent uniform international sales law. The CISG legislators selected this language and set it into the CISG with no substantive change whatsoever.[20] It came accompanied with ULIS jurisprudence and doctrine holding that attorneys' fees are encompassed by its provisions;[21] and a Secretariat Commentary supporting damages as

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[20] A roadmap to the legislative history of CISG Article 74 is provided at <http://cisgw3.law.pace.edu/cisg/text/roadmap/intro-74.html>.

[21] Audit states that "[t]he international character of the Convention should encourage courts to refer to the Convention's legislative history and prior instruments (i.e., the ULIS . . .) in order to ascertain the most likely intent underlying the wording of a given provision." Bernard Audit, *The Vienna Sales Convention and* the Lex *Mercatoria*, in Thomas E. Carboneau ed., LEX MERCATORIA AND ARBITRATION, Juris Publishing, rev. ed., (1998). Citing century old precedent to the effect that where a term is used in one statute, a subsequent statute that incorporates the same term in a similar context must be construed so that the term is interpreted according to the meaning that has been previously assigned to it, Mann states: "It is simply common sense that if the Convention adopts a phrase which appears to have been taken from [an international convention] where it is used in a specified sense, the international legislators are likely to have had that sense in mind and to intend it introduction into the Convention." F.A. Mann, *Uniform Statutes in English Law*, 99 L.Q. Rev. 376 at 383 (1983). ULIS Article 82 doctrine and jurisprudence on attorneys' fees as damages are

(continued...)

full compensation.[22]

(3) Doctrine (scholarly writings). The template should also refer to doctrine on the CISG to the extent relevant. Citing no CISG doctrine, the Seventh Circuit states that "there are no principles that can be drawn for determining whether 'loss' [as this term is used in CISG Article 74] includes attorneys' fees."[23] Commentators disagree. The leading commentary on the CISG states: "**Basic principle 1. Damages as full compensation.**[24]" Honnold (United States), Audit (France), Knapp (Czechoslovakia), Illescas Ortiz & Perales Viscasillas and Panteleón Prieto (Spain), Karollus (Austria), Newmayer & Ming and Schönle (Switzerland), Saidov (Uzbekistan),

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(...continued)
accordingly referred to below along with CISG doctrine and jurisprudence on this subject. See citations to Stoll and Herber & Czerwenka, *infra* notes 24 and 27.

[22] UN A/CONF/97/5, Doc. C(3) at 58-80. Commissioned by the UN General Assembly to guide the CISG's legislators, the Secretariat Commentary is the closest available counterpart to an official commentary on the Convention.

[23] Zapata, *supra* note 18.

[24] Hans Stoll, *Damages*, in Peter Schlechtriem ed., COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), Clarendon: Oxford, 553 (1998). This guide to the CISG, along with its German edition, KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT, Beck 3rd ed. (2000) is cited most frequently by courts of sister signatories to the CISG. This commentary states: "The Convention provides for damages for loss, including loss of profit, suffered as a consequence of breach of contract (Article 74, first sentence), but does not define in more detail which are the losses for which compensation can be obtained. In order to identify the losses for which compensation may be demanded, regard must be had to the principle of full compensation. . . ." *Id.* at 558. Full compensation means that the aggrieved party is entitled to compensation for all consequences of the breach (Stoll, *op. cit.*, Kommentar at 697), albeit limited by foreseeability and mitigation requirements. Felemegas, *supra* note 19.

Enderlein & Maskow and Piltz (Germany) also so state.[25]

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[25] John O. Honnold, UNIFORM LAW FOR INTERNATIONAL SALES, Kluwer, 3rd ed. (1999) 445 ("Damages consist of 'the loss, including loss of profit suffered . . . as a consequence of the breach' . . . a standard that is designed to place the aggrieved party in as good a position as if the other party had properly performed the contract"); Bernard Audit, LA VENTE INTERNATIONALE DE MARCHANDISES, Librarie Générale de Droit et de Jurisprudence (1990) ("La Convention consacre le principe de la reparation intégrale [the principle of full compensation] du dommage prévisible"); Viktor Knapp, *Damages in general*, in C.M. Bianca & M.J. Bonell eds, COMMENTARY ON THE INTERNATIONAL LAW, Giuffrè (1987) 543 ("Article 74 is based on the principle of full compensation"); Rafael Illescas Ortiz & Pilar Perales Viscasillas, DERECHO MERCANTIL INTERNSVCIONSL. EL DERECHO UNIFORME, Madrid (2003) 224; Fernando Pantaleón Prieto, in Luis Diez-Picazo y Ponce de Leon, LA COMPRAVENTA INTERNACIONAL DE MERCADERIAS (1998) 591 ("Principio de conpensación plena [the principle of full compensation] o resarcimiento o reparación integral"); Martin Karollus, UN-KAUFRECHT. EINE SYSTEMATISCHE DARSTELLUNG FÜR STUDIUM UND PRAXIS, Springer (1991) ("Grundsatz der Totalreparation Prinzip [general principle of full compensation] des vollen Schadenasugleichs"); Karl H. Neumayer & Catherine Ming, COMMENTAIRE DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES, CEDIDAC (1993) ("La Convention part du principe de la reparation intègrale [the principle of full compensation]: le debiteur est tenu de rembourser la totalité du préjudice prévisible qu'il a causé, ce qui inclut tous de désavantages qu'il a occcasionnés à son concontractant . . . ."); Herbert Schönle, in Heinrich Honsell ed, KOMMENTAR ZUM UN-KAUFRECHT, Springer (1997) 943 ("Geschuldet wird grundsätzlich Totalreparation [principle of full compensation] . . . Der Richter kann dem Geschädigten nicht lediglich teilweisen Ersatz des verursachten Schadens zusprechen"); Djakhongir Saidov, *Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*, (2003), <http://cisgw3.law.pace.edu/cisg/biblio/saidov.html> ("[C]ompensation for 'loss, including loss of profit, suffered as a consequence of the breach' . . . covers any situation which causes any type or form of loss . . . the principle of full compensation . . . should be the basis for determining the loss"); Fritz Enderlein & Dietrich Maskow, INTERNATIONAL SALES LAW, Oceana, 298-299 (1992); Burghard Piltz, INTERNATIONALES KAUFRECHT.

(continued...)

Illescas & Perales state that legal costs as well as the costs of a specialist are within the concept of loss. Schlechtriem concurs, as does Felemegas.[26] Herber & Czerwenka state: *"The costs of legal consequences, in specific the cost of attorneys' fees and court fees, are to be compensated [under Article 74]. The procedural costs are regularly ruled upon in the applicable procedural rules. If it is the case that the procedural rules settle the compensation issue in its entirety, these cost-shifting procedural rules are of the essence also in determining the issue of liability for damages. If . . . the procedural rules do not determine the compensation of legal costs for the prevailing party or determine them only in part, these can be claimed as damages under the CISG."* [27]

(4) Case law

The Seventh Circuit states that "it seems apparent that 'loss' [as the term is used in CISG Article 74] does not include attorneys' fees incurred in the litigation of a suit for breach of contract, though certain pre-litigation legal expenses for

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(...continued)
DAS UN-KAUFRECHT, Beck (1993) 289 "Art. 74 Satz 1 sicht daher vor, dass der infolge der Vertragsverletzung zu ersetzen ist, und zielt auf den vollen Ausgleich aller der anderen Vertragspartei zugefügten Nachteile (Grundsatz der Totalreparation) [principle of full compensation)".

[26] Illescas & Perales, *supra* note 33 ("los costes legales, asi como, en su case, los gastos por utilización de un especialista, tanbién entran en el concepto de daños y perjuicios"). See also Schlechtriem, *supra* note 19; see also Felemegas, *supra* note 19.

[27] Rolf Herber & Beate Czerwenka, INTERNATIONALES KAUFRECHT, KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER DEN INTERNATIONALEN WARENKAUF, Beck (1991). They cite the ruling on ULIS Article 82 in *Landricht* [District Court] of Essen, available at <http://cisgw3.law.pace.edu/ cases/800610g1. html>.

example, expenditures designed to mitigate the plaintiff's damages would probably be covered as 'incidental' damages."[28] The court does not explain how it parses CISG Article 74 to read the UCC term "incidental" damages into the CISG. The court cites UCC case law as authority for this interpretation of the CISG, but no CISG case law. This conflicts with approaches taken by courts of sister signatories. Where relevant CISG case law is available, it has been cited; where considerable CISG case law is available, courts of sister signatories have cited considerable CISG case law.[29]

There are many CISG cases are on point. Citing Honnold, the *U.S. Second Circuit Court of Appeals* states that "CISG art. 74 . . . is 'designed to place the aggrieved party in as good a position as if the other party had properly performed the contract'." The *Appellate Court of Hamburg* states that the damages payable based on a breach of contract under Article 74 are not limited to lost profit but extend to total loss caused by the non-performance. The *Supreme Court of Austria* states that liability for damages means that the party relying on the contract should be put in the same financial position he had been in, had the contract been duly performed in accordance with the principle of full compensation. An *ICC Arbitration panel* states that Article 74 gives a right to the aggrieved party to obtain compensation for any predictable damages arising out of the fundamental non-performance of a contracting party. The *Court of Konstanz* awarded the seller damages for costs incurred by employing a collection agency. The court held that these expenses belonged to the costs to be compensated "which

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[28] Zapata, *supra* note 18.

[29] See, for example, *Tribunale* [District Court] Vigevano 12 July 2000 (forty relevant CISG cases cited) and *Tribunale* Rimini 26 November 2002 (thirty-seven relevant CISG cases cited), available at <http://cisgw3.law.pace.edu/cases/000712i3.html> and <http://cisgw3.law.pace.edu/cases/011126i3.html>.

the [buyer] ought to have foreseen as a possible consequence of the breach at the time of the conclusion of the contract. Drawing on the literal meaning of the damages provision in the uniform international sales law, the *Court of Essen* allowed compensation for attorneys' fees as damages, stating: "The court does not follow the [buyer]'s opinion that the German national principle regarding collection fees should be applied. Under this principle, the compensable amount for employing a collection agency is limited by the official attorney fee for a request for payment. These judge-made German rules cannot automatically be applied to a determination of damages under [the uniform international sales law], both for reasons of private and international and material law." The *Viechtach Court* granted the plaintiff attorneys' fees under Article 74. According to this court, the term "loss" in Article 74 encompasses the cost of pursuing one's rights. A *Belgian Court* granted the plaintiff collection costs resulting from protesting a check that did not clear. According to that court, such costs fall under Article 74. Costs relating to collection of outstanding payments were awarded as damages by a *Swiss Court*. The court stated that the costs resulting from hiring an attorney for collection purposes were recoverable under Article 74 insofar as breach of contract gave sufficient rise for such expenses. A *Dutch Court* awarded the plaintiff collection costs, stating that Article 74 did not exclude such costs. The *Aachen Court* awarded the plaintiff collection costs, stating that such costs have to be reimbursed under Article 74. The *Austrian Supreme Court* confirmed the principle of full compensation in Article 74, stating that due to a party's breach of his contractual obligation, the aggrieved party is entitled to full compensation for its losses. The *Court of Düsseldorf* did not award the plaintiff damages for attorneys' fees even though the court stated that Article 74 of the CISG encompasses compensation for the cost of a reasonable pursuit of one's legal rights. The court stated that it was against good

faith to claim attorneys' fees both as damages and as a part of the cost of proceedings which, according to the loser-pays rule, are borne by the defendant. The *Berlin Court* awarded the plaintiff attorneys' fees as damages, stating that under Article 74 the aggrieved party is entitled to damages for consequential loss resulting from the contractual breach. The court brings forth that the function of Article 74 is to remedy the aggrieved party so as to put him in the same financial position he would have been in if the contract had been duly performed by the party in breach. An *ICC Arbitration proceeding* awarded the plaintiff damages for preservation costs of undelivered goods, attorneys' fees and arbitration expenses and loss of profit. The Tribunal stated that such losses are foreseeable in the meaning of Article 74 and usual in cases of avoidance of a contract for breach of one party. The *Frankfurt Court* stated that Article 74 covers the expenses for appropriate legal actions taken and in particular costs of collection proceedings if the purchase price was due at the time of request for payment.[30]

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[30] The cases are respectively: United States, *Delchi v. Rotorex*, 71 F.3d 1024 (2nd Cir. 1995); Germany, *Oberlandesgericht* Hamburg 26 November 1999 <http://cisgw3.law. pace.edu/cases/991126g1.html>; Austria, *Oberster Gerichthof* 14 January 2002, <http://cisgw3.law.pace.edu/ cases/020114a3. html>; *ICC* Arbitration Case No. 8716 of February 1997, <http://cisgw3 .law.pace.edu/cases/97871611.html>; Germany, *Landgericht* Konstanz 3 June 1983, <http://cisgw3.law.pace.edu/cases/830603g1.html>; Germany, *Landgericht* Essen, 10 June 1980, <http://;cisgw3.law.pace.edu/ cases/ 800610g1.html>; Germany, *Amtsgericht* Viechtach 11 April 2002, <http://cisgw3.law.pace.edu/cases/ 020411g1.html>; Belgium, *Rechtbank van Koophandel* 4 April 2001, <http://cisgw3.law.pace.edu/cases/010404b1. html>; Switzerland, *Handelsgericht* Aargau 19 December 1997, <http://cisgw3.law.pace.edu/cases/971219s1. html>; Netherlands, *Gerechtshof* s' Hertogenbosch 2 October 1997, <http://cisgtw3.law.pace. edu/cases/971002n1. html>; Germany, *Landgericht* Aachen 20 July 1995, <http://cisgw3.law.pace.edu/cases/950720g1.html>; Austria, *Oberster*

(continued...)

These courts are in accord with the legislative history and doctrine on CISG Article 74. Insofar as domestic labels should not play a role in a CISG-governed dispute, the holdings of these courts support the conclusion that attorneys' fees may be claimed as damages under CISG Article 74.

IV. Assessment of issues

Considering the text of Article 74 and taking into account its legislative history, doctrine and case law, "loss" including loss of profit suffered as a consequence of a breach of contract means full compensation; the plain meaning of *full* is "entire", "containing as much as possible", "lacking restraint or limitation". If one looks to the plain meaning of *full*, full compensation includes recovery of attorneys' fees when, as in the *Zapata* case, they are foreseeable and (in accordance with Article 77) reasonable. One must also ask:

- Does domestic procedural law or another theory of law preclude or preempt the application of Article 74 to foreseeable attorneys' fees. If so: Is the basis for this the CISG?

The U.S. Constitution states that treaties are the supreme law of the land. If full compensation under the CISG includes attorneys' fees and the CISG is supreme, it would seem that no source other than the CISG can preempt or preclude its application—other than a later-in-time source. In the absence

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(...continued)
Gerichthof 6 February 1996, <http://cisgw3.law.pace.edu/cases/ 960206a3.html>; Germany, *Oberlandesgericht* Düsseldorf 14 January 1994, <http://cisgw3.law.pace.edu/cases/940114g1.html>; Germany, *Landgericht* Berlin 30 September 1992, <http://cisgw3.law.pace.edu/cases/920930g1.html>; *ICC* Arbitration Case No. 7585 of 1992, <http://cisgw3.law.pace.edu/ cases/927585i1.html>; and Germany, *Landgericht* Frankfurt 16 September 1991, <http://cisgw3.law.pace.edu/ cases/910916g1.html>.

of such, the basis for any preemption or preclusion of the absence of this treaty to attorneys' fees would therefore have to be the CISG. If within the CISG, there is adequate autonomous support for such preemption or preclusion, the Court should so hold. If not, the Court should not so hold.

- Or is there an alternative basis for such a preclusion or preemption?

An alternative is to set aside the CISG and resolve the issue by turning to domestic law, e.g., domestic procedural law. The Seventh Circuit took this approach. It raises another issue that merits Supreme Court review: labels, substantive law vs. procedural law; whether a domestic label should control a CISG proceeding.[31]

CONCLUSION

We urge the Court to look upon this case as an opportunity:

- To correct errors and provide guidance on autonomous interpretation of the CISG, within its four corners; and
- Drawing on U.S. judicial experience with uniform-law case law, to encourage all courts to consider case law of sister signatories when ruling on uniform international sales law.[32]

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[31] For views of leading commentators (the leading U.S. commentator and a leading Singapore commentator) that domestic labels should not control CISG proceedings, see John O. Honnold, *supra* note 25 at 74-76, and Warren L.H. Khoo, in C.M. Bianca & M.J. Bonell eds., COMMENTARY ON THE INTERNATIONAL LAW, Guiffré, 48 and 50 (1987). See also C. Giovannucci Orlando, *Procedural Law Issues and Uniform Law Conventions*, Uniform Law Review 23-41 (2000-2001).

[32] Article 7(1) of the CISG, properly understood "requires . . . an approach not unlike the treatment U.S. courts accord decisions of other jurisdictions when applying our Uniform Commercial Code." Harry M. Flechtner,

(continued...)

Courts of all countries can benefit from U.S. judicial experience with uniform-law case law.

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(...continued)

Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1), 17 J.L. & Com. 187-217 (1998). "[W]hen interpreting the Convention, a court should look to other court's interpretations of the Convention, including the interpretations of courts from other countries. . . . The use in the U.S. of case law to interpret the Uniform Commercial Code (UCC) can serve as a model for courts using case law to interpret the Convention. No state within the U.S. is bound by an interpretation of the UCC from another state, but the interpretations of the UCC from other jurisdictions are extremely persuasive. While this method does not achieve exact uniformity, the U.S. has achieved a level of uniformity in sales law that is useful to companies transacting business in many states." Philip T. Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 Louisiana L. Rev. 479 (2001).

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No. 02-1318

IN THE
Supreme Court of the United States

ZAPATA HERMANOS SUCESORES, S.A., PETITIONER,

v.

HEARTHSIDE BAKING CO. D/B/A MAURICE LENELL COOKY CO., RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

The Solicitor General's Amicus Brief reflects a disturbing lack of commitment to the obligations undertaken by the United States, through its ratification of the CISG, to foster a uniform body of international law governing the sale of goods. The Government openly advocates the Seventh Circuit's isolationist disregard of multiple foreign precedents interpreting CISG Article 74, and it disregards the canons of construction imposed by Article 7. Ironically, the arguments mustered by the Solicitor General actually provide compelling proof that the Seventh Circuit erred, that the questions presented are indeed unsettled and vitally important, and that these questions can only be answered with Supreme Court intervention.

I. The Solicitor General confirms the Seventh Circuit's erroneous reading of the CISG with his inability to offer any principled rationale for the Seventh Circuit's holding that is rooted in either the text or principles of the CISG. The Solicitor General argues (at 6) that attorneys' fees can never qualify as a recoverable "loss" under Article 74 because the recoverability of such fees is "an issue of procedure." Yet, he points to *nothing* in the text or history of the CISG supporting the conclusion that Article 74 draws any nebulous distinction between "substantive" and "procedural" losses. Indeed, "in interpreting international Conventions, all abstract distinctions between substantive and procedural laws become redundant, if not harmful, especially when the parties turn to the courts for equal enforcement of their contractual rights pursuant to these uniform bodies of rules." C. Orlandi, *Procedural Law Issues and Law Conventions*, V UNIFORM L. REV., 23, 24 (2000). The Government also never explains how the meaning or scope of Article 74 could plausibly be a "procedural" question left to the differing domestic laws of each signatory nation. Yet, as the Solicitor General concedes (at 8-9), that is the "inevitable" consequence of its position because Article 74's "substantive provisions [would then] be enforced through a variety of procedural means"—a result wholly at war with CISG's purpose of fostering "uniformity" in its interpretation.

The Solicitor General argues (at 6 n.1) that recovery of attorneys' fees is an "ancillary matter" not governed by contract law. That may be true when attorneys' fees are shifted automatically to a losing party under local procedure. But where, as here, attorneys' fees are sought as a component of the plaintiff's consequential *damages*, such recovery is necessarily governed by substantive contract law, in this case Article 74. As petitioner has explained (Pet. 17), the question presented here is *not* whether attorneys' fees should automatically be awarded to all prevailing plaintiffs under Article 74; it is whether such fees may be awarded as an element of a plaintiff's "loss" where Article 74's foreseeability requirements are met—just like any other form of recovcrable loss. Because this question turns on the text of the CISG itself, there can only be one answer to this question, and it is the obligation of every CISG signatory to find that answer in the text and principles of the CISG itself (see Art. 7), not in the varying mandates of domestic law.

In any event, the Solicitor General's view that the limits of Article 74 depend on the porous line between substance and procedure itself confirms the need for Supreme Court review because, as the Government acknowledges (at 6 n.1), "there may be some debate about whether attorneys' fees are properly construed as procedural or substantive." See also Pet. 17 n.7

The Solicitor General also argues (at 5) that attorneys' fees should not be recoverable as damages because Article 74 does not contain "any reference to attorneys' fees." But this too is plainly wrong, for if Article 74 is read only to permit the recovery of losses expressly mentioned, the provision would be meaningless since Article 74 "does not expressly mention *any* category of loss." Felemegas, 15 PACE L. REV. As the Second Circuit correctly held in *Delchi,* 71 F.3d at 1030, Article 74 is instead written in broadly *inclusive* terms to permit the recovery of *all* losses, "subject only to the familiar limitation that the breaching party must have foreseen, or should have foreseen, the loss as a probable consequence." And there is no indication anywhere in the CISG that signatories intended to *exclude*

attorneys' fees or any other category of loss from its scope. In cases like this where foreseeability is proven, the Solicitor General is simply wrong to argue (at 8) that there is "no reason to believe that any party to the Convention expected that a plaintiff's 'loss' would include its attorneys' fees." In such cases, the text of Article 74 *itself* confirms that expectation.

The Solicitor General also incorrectly assumes that any issue not expressly settled by the CISG must be resolved by domestic law. To the contrary, Article 7(2) requires that any "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which [the CISG] is based." The Government inexplicably ignores these principles *altogether*. For instance, it is undisputed that "one of the most fundamental general principles upon which the Convention based" is the principle of "full compensation"—a principle the district court prominently relied upon and held could only be satisfied "by freeing [a plaintiff's] damages recovery from the burden of attorneys' fees." Pet. App. 17a. The Solicitor General notably ignores this holding—as did the Seventh Circuit.

Even more disturbing, though, is the Government's striking lack of concern for the obligations undertaken by the United States "to promote uniformity in [the CISG's] application," and to foster the CISG's "expressly stated goal of developing uniform international contract law to promote international trade." *Asante Tech.*, 164 F.Supp. at 1151. Indeed, the Solicitor General's position reflects just the sort of "'island' or 'lone ranger' mentality" (to borrow Justice Ginsburg's recent phrase[1]) that the CISG was meant to eradicate. The Solicitor General openly defends the Seventh Circuit's disregard of foreign decisions construing Article 74 because "those decisions were rendered by courts and arbitration panels in only

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[1] Hon. Ruth Bader Ginsburg, Address to the Convention of the American Constitution Society, August 2, 2003. See www.americanconstitution-society.org/pdf/Ginsburgtranscriptfinal.pdf.

three countries (Germany, Switzerland, and France)"and because "none was rendered by the country's highest court"[2]—as if the views of appellate courts and other tribunals in these important signatory nations simply don't count. In the Solicitor General's view, it was also entirely proper for the Seventh Circuit to ignore these decisions in its opinion because "there is no reason to believe that it did not consider them." *Id.* at 11. But that is plainly wrong. To "promote uniformity in [the CISG's] application," courts *must* be required, at a minimum, to discuss precedents from other nations addressing similar issues. As Justice O'Connor has explained, while foreign decisions "are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts." 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002).That is particularly so here given the purpose of the CISG, and since "there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here." *Ibid.*

While U.S. courts may not be *bound* by foreign decisions, U.S. courts must at least be required to explain why they are rejecting foreign precedents when they choose to do so. Without such dialogue, it will be impossible to foster the sort of "uniform interpretation" of the CISG that Article 7 requires. As Justice O'Connor recently noted in an address to the Southern Center for International Studies, "when it comes to the impression created by the treatment of foreign and international law and the United States courts, the jury is still out." *Atl. J. Const.* p. A3 (Oct. 29, 2003). Indeed, the Government's

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[2] The Government's assertion that none of the foreign decisions relied on in the Petition were decided by a country's highest court is wrong. As explained at Pet. 15, the Seventh Circuit's decision conflicts with the Austrian Supreme Court's holding that "[u]nder the second sentence of Art. 74, a claim for damages is *only* limited by the foreseeability of the loss for the party in breach." Case No. 1 Ob 292/99v (Apr. 28, 2000) (emphasis added).

position gives little comfort in this regard. Yet, the time for such myopic disregard of foreign precedent has long since passed. As Justice Breyer recently put it, "[b]y now * * * it should be clear that the chicken has broken out of the egg."[3]

The Solicitor General also argues that foreign decisions addressing the recoverability of attorneys' fees under Article 74 are entitled to no weight because they come from "loser-pays jurisdictions" where "attorneys' fees are available under domestic procedural law." Quite the contrary, the fact that other nations have held attorneys' fees to be recoverable under Article 74 even though certain fees could be shifted to losing parties under domestic law anyway confirms that their recoverability under Article 74 has nothing to do with domestic law. For instance, the German Court of Appeals in Düsseldorf (discussed at Pet. 10) awarded a plaintiff *certain* of its attorneys' fees pursuant to domestic procedural law, but ruled that the *remaining* attorneys' fees, which were *not* awardable domestically, were recoverable under Article 74 as *damages* in order to make the plaintiff whole. As such decisions confirm, allowing attorneys' fees to be recoverable under Article 74 would not, as the Solicitor General suggests (at 6), "displace the more general loser-pays rules *** that apply in other countries."

In sum, the Solicitor General's arguments on the merits in no way diminish the compelling grounds that warrant Supreme Court review. To the contrary, they actually *highlight* the unanswered questions that require this Court's definitive answer. Are losses recoverable under the CISG only if expressly mentioned in Article 74? Is the recoverability of attorneys' fees as a "loss" under Article 74 a procedural question governed by domestic law? Under what circumstances is a question "not settled" by the CISG? If a question is "not

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[3] Hon. Stephen G. Breyer, Keynote Address Before the 97th Annual Meeting of the American Society of International Law, April 4, 2003. See www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

settled" by the CISG, may a court then resort to domestic law to answer it consistent with CISG Article 7(2)? What obligations do U.S. courts have to consider and discuss foreign precedents construing the CISG in order to foster a uniform interpretation of the CISG? This case provides an ideal opportunity for the Court to settle these questions once and for all, to resolve the international split of authority created by the Seventh Circuit, to address the CISG for the first time, and bring needed clarity and uniformity to this vitally important area of international commercial law.

II. The Solicitor General strangely accuses petitioner of overstating the circuit splits over the inherent power of federal courts to sanction bad faith conduct, when the Solicitor General's own Brief confirms that those conflicts do exist. In fact, the Government's Brief demonstrates that this case provides a unique opportunity for the Court to resolve *both* the question of whether the inherent power to sanction is limited by rules-based sanctioning mechanisms, and whether courts can consider pre-litigation conduct in deciding whether to sanction related bad faith conduct during the litigation process.

A. The Solicitor General's defense of the Seventh Circuit's inherent power holding hinges on his argument (at 15) that *Chambers* permits a court to exercise its inherent power to sanction only when rules-based sanctioning mechanisms are not "up to the task." But that argument begs the *very question* to be decided, and over which the circuits are deeply divided.

The Solicitor General claims (at 16) that there is no circuit split over whether the inherent power to sanction bad faith conduct extends only to conduct not covered by sanctions statutes or rules because petitioner "cites no decision" inconsistent with the rule that a court may only exercise its inherent authority to sanction when statutes or rules "are not up to the task." But this is demonstrably wrong. As the Government's Brief confirms (at 16-18), there are *nine* circuits rejecting the rule that the inherent power to sanction bad faith conduct extends only to conduct not sanctionable by rule, and

which thus *routinely* affirm inherent power sanctions without requiring *any* consideration of whether rules-based mechanisms are "up to the task." See Pet. 25-26; Reply Br. 7-9.[4] These circuits have relied on *Chambers'* statement that a court is not "forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules." The Seventh Circuit, on the other hand, like the First and Third Circuits before it, reached exactly the opposite conclusion, holding that the courts' inherent power to sanction extends only to conduct "not adequately dealt with by other rules," and that the "limitations" of those rules "are equally limitations on inherent authority, which may not be used to amend the rules." Pet. App. 8a, 9a. The prejudice to petitioner from this circuit split is obvious, since the district court's sanction below would not have been

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[4] See, *e.g.*, *DLC Mgt. Corp.*, 163 F.3d at 136 (2d Cir.) ("the fact that there may be a statute or rule which provides a mechanism for imposing sanctions of a particular variety for a specific type of abuse does not limit a court's inherent power to fashion sanctions, even in situations similar or identical to those contemplated by the statute or rule"); *Travelers Ins. Co.*, 38 F.3d at 1418 (5th Cir.) ("a court is not forbidden from sanctioning bad-faith conduct under its inherent powers simply because that conduct could also be sanctioned under § 1927 or the Federal Rules of Civil Procedure"); *First Bank of Marietta*, 307 F.3d at 514 ("In our view, *Chambers* should be read broadly to permit the district court to resort to its inherent authority to sanction bad-faith conduct, even if the court has not expressly considered whether such conduct could be sanctioned under all potentially applicable rules or statutes"); *Fink*, 239 F.3d at 994 (9th Cir.) ("It is well settled * * * that the district court may, in its informed discretion, rely on inherent power rather than the federal rules or § 1927"); *Thomas*, 293 F.3d at 1328 n.32 (11th Cir.) ("That sanctions may have been possible under [statutes or rules] did not negate the district court's inherent power to levy sanctions against Munson for her misconduct"); *In re Mroz*, 65 F.3d at 1575 (11th Cir.) ("the 'inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct,' for these rules are not substitutes for the inherent power"); *Pickholtz*, 284 F.3d at 1377 (Fed. Cir.) ("*Chambers* * * * permits, indeed requires, the court to separately consider [a] motion for attorney fees under its inherent power, which is an independent basis for assessing sanctions, one not preempted by Rule 37").

reversed in any of nine circuits for failure to determine whether Lenell's conduct could be sanctioned by statute or rule.

The Solicitor General tries to distinguish the majority cases on the ground that they contain "no finding that the conduct in question was in fact" sanctionable. U.S. Br. 17. But that is no distinction at all, and in fact misses *the whole point*. The fact that nine circuits uphold the imposition of inherent power sanctions without requiring any consideration of whether rules-based sanctioning mechanisms are "up to task," while three other circuits do impose that requirement, is itself the very circuit split that requires resolution by this Court. Indeed, the question squarely presented by this case is whether a court must find conduct not to be adequately dealt with by rules-based sanctions before it exercises its inherent power to sanction. It is simply undeniable that the circuits are deeply divided over this recurring and important question, which can only be resolved by this Court.

B. The Solicitor General also argues that there is no circuit split over whether a court may sanction purely pre-litigation conduct. We agree, but that is *not* the question presented. As the Solicitor General later acknowledges (at 15), the question also presented is whether a court may rely on pre-litigation conduct to sanction related bad faith conduct *during* the litigation. As to *this* important question, the Solicitor General makes no attempt to deny that the Seventh Circuit's decision irreconcilably conflicts with those of the Second, Fifth, Sixth and Eighth circuits. See Pet. 27-28. Instead, he merely observes (at 15) that "it is not clear that that question will have any significance in this case, because it is not clear how much of the conduct that gave rise to the fee award is properly classified as pre-litigation conduct." As the Seventh Circuit's decision makes plain, however, that classification makes no difference here at all.

The district court found that Lenell engaged in "extreme bad faith" through its pre-litigation refusal to pay an indisputable debt – bad faith conduct that then extended *into* the

litigation process when Lenell misused the judicial process to "make it as difficult and expensive as possible for Zapata to receive its money in this litigation" by "dramatically and needlessly expanding the scope of this litigation [and] interposing a host of unwarranted roadblocks" through "late-advanced, convoluted, multifarious and (regrettably) baseless defenses and counterclaims." Pet. App. 20a-22a, 23a, 25a.

Notwithstanding these specific findings of bad faith conduct during the litigation process, the Seventh Circuit vacated the district court's *entire* sanction simply because Lenell's bad faith conduct during the litigation was related to its *pre-litigation* refusal to pay. Pet. App. 7a. In the Seventh Circuit's view, conduct "giving rise to the litigation" is categorically off-limits, *regardless* of whether it relates to bad faith conduct during the litigation and how much of the fee award is attributed to the pre-litigation conduct, because otherwise "the punishment would be a product of substantive law." Pet. App. 7a.

As the Solicitor General's Brief acknowledges (at 14), the Seventh Circuit's holding irreconcilably conflicts with the Eighth Circuit's decision in *Lamb Eng'g,* which "adopted the view promulgated by various circuits that, in determining whether to award attorney fees based on the litigant's bad faith, '[t]he court may consider conduct both during and prior to the litigation, although the award may not be based solely on the conduct that led to the substantive claim.'" 103 F.3d at 1435. Accord *Sussman,* 56 F.3d at 459 (2nd Cir.) ("the court's inherent power is broader and would permit the court to impose sanctions on the basis of related bad-faith conduct prior to the commencement of the litigation"); *Shimman,* 744 F.2d at 1230, 1234 (6th Cir.) (inherent power to sanction extends to bad faith pre-litigation conduct "necessitating that an action be filed," particularly "where the defendant contumaciously refused to allow the plaintiff what was plainly owed, thus forcing the plaintiff to go to court"); *Perales,* 950 F.2d at 1071 (5th Cir.); *Ass'n of Flight Attendants,* 976 F.2d at 548-50 (9th Cir.).

It is difficult to imagine a case that more squarely presents the question of whether a court may rely on pre-litigation conduct in deciding to sanction related bad faith conduct during the litigation, both because the district court specifically found related acts of bad faith before and during the litigation, and because the Seventh Circuit foreclosed *any* consideration of pre-litigation conduct. In sum, the Solicitor General's Brief leaves no doubt that this case provides a unique opportunity for the Court to resolve *two* independently significant and recurring circuit splits over the limits of the federal courts' inherent power to sanction bad faith litigation conduct.

III. The Solicitor General lastly recommends that the Court deny the Petition because the Seventh Circuit's decision is somehow "interlocutory." That again is demonstrably wrong. The court of appeals fully and finally resolved petitioner's ability to seek attorneys' fees as damages under Article 74 of the CISG, and as a sanction pursuant to the courts' inherent power. The Solicitor General theorizes (at 18), however, that on remand the district court still could sanction Lenell for bad faith conduct if it finds that "*at least some* of that conduct is 'not adequately dealt with by other rules." (Emphasis added). But this affords no basis for denying the Petition for at least two reasons. First, the Seventh Circuit's holding that the Court's inherent power to sanction is subject to the procedural limits of Fed. R. Civ. P. 11 arguably precludes any further sanction since Rule 11 prohibits any sanction absent compliance with its notice and safe harbor provisions—compliance that is now impossible. And second, even if sanctions were still theoretically possible, petitioner would only be able to recover a fraction of the fees that were previously awarded. In short, affirmance or reversal by this Court would definitely resolve both questions presented and bring this litigation to an end.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

ZAPATA HERMANOS SUCESORES, S.A., PETITIONER

v.

HEARTHSIDE BAKING COMPANY, D/B/A MAURICE LENELL COOKY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether attorneys' fees and litigation expenses are a recoverable form of "loss" under Article 74 of the United Nations Convention on Contracts for the International Sale of Goods.

2. Whether a district court may award attorneys' fees under its inherent authority as a sanction for the conduct giving rise to the litigation or for conduct during the litigation that is sanctionable under a statute or rule.

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In the Supreme Court of the United States

No. 02-1318

ZAPATA HERMANOS SUCESORES, S.A., PETITIONER

v.

HEARTHSIDE BAKING COMPANY, D/B/A MAURICE LENELL COOKY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. Because the court of appeals' decision is correct, consistent with the decisions of this Court and other courts of appeals, and interlocutory, the position of the United States is that the petition for certiorari should be denied.

STATEMENT

1. Petitioner Zapata Hermanos Sucesores (Zapata), a Mexican company, supplied cookie tins to respondent Maurice Lenell Cooky Company (Lenell), an American company. Petitioner sued respondent for breach of contract under the United Nations Convention on Contracts for the International Sale of Goods (Convention), Apr. 11, 1980, S. Treaty Doc. No. 9, 98th Cong., 1st Sess. (1983). After a jury

trial in the United States District Court for the Northern District of Illinois, a judgment of approximately $1.2 million was entered in petitioner's favor. Pet. App. 1a-2a.

The district court also awarded petitioner approximately $537,000 in attorneys' fees and litigation expenses. Pet. App. 11a-22a, 23a-32a. In making this award, the court relied primarily (*id.* at 11a-18a) upon Article 74 of the Convention, which provides that "[d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach," and that "[s]uch damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract." Based on a stipulation between the parties, the court found that it was foreseeable to respondent that petitioner would incur litigation costs, including attorneys' fees, in pursuing a breach-of-contract action. Pet. App. 13a. The court reasoned that those costs were recoverable as part of the "loss" under Article 74. *Id.* at 18a. As an alternative basis for the award of attorneys' fees, the district court relied on its inherent authority to impose sanctions (*id.* at 18a-20a), finding that respondent's conduct "both leading up to and during the litigation" supported such an award (*id.* at 19a).

2. The court of appeals affirmed the liability judgment but reversed the award of attorneys' fees and remanded for further proceedings. Pet. App. 1a-10a.

a. The court of appeals first held that the term "loss" in Article 74 of the Convention does not include attorneys' fees. Pet. App. 2a-4a. The court began its analysis (*id.* at 2a) by quoting Article 7(2) of the Convention, which provides that "questions concerning matters governed by th[e] Convention which are not expressly settled in it" are to be settled, if possible, "in conformity with the general principles on which it is based." The court went on to say that "[t]he Convention is about contracts, not about procedure," and that "principles

for determining when a losing party must reimburse the winner for the latter's expense of litigation" are "usually not a part of a substantive body of law, such as contract law." Pet. App. 3a. The court noted that, although there are "numerous exceptions to the principle that provisions regarding attorneys' fees are part of general procedure law," Article 74 is not one of them. *Ibid.* "[N]ot only is the question of attorneys' fees not 'expressly settled' in the Convention," the court said, "it is not even mentioned." *Ibid.* Nor, the court added, are there any "'principles' that can be drawn out of the provisions of the Convention" for determining whether "loss" includes attorneys' fees. *Ibid.* The court thus concluded that, "by the terms of the Convention itself," the availability of such fees "must be left to domestic law"—in this case, the American rule under which litigants bear their own costs. *Ibid.*

The court of appeals also believed that interpreting the term "loss" in Article 74 to include attorneys' fees "would produce anomalies." Pet. App. 4a. While, under petitioner's interpretation of Article 74, foreseeable fees are part of the prevailing plaintiff's "loss," the court questioned what effect that interpretation would have on a prevailing *defendant*'s ability to invoke domestic procedural law to recover fees and whether a prevailing plaintiff could opt to be compensated for unforeseeable fees under a domestic law that is more generous than Article 74. *Ibid.* The court also questioned whether the United States would have signed the Convention if it had thought it was abandoning the American rule, and whether the countries that routinely award fees to prevailing parties would have "thought about the question at all." *Ibid.*

b. The court of appeals also reversed the award of attorneys' fees insofar as it was based on a court's inherent authority to impose sanctions for bad-faith conduct. Pet. App. 4a-9a. The court began its analysis by observing that

the award of fees was based, in part, on the district court's "indignation at Lenell's having failed to pay money conceded to be owed by Zapata." *Id.* at 4a. While it is true, the court said, that punitive damages are sometimes awarded "for breach of contract in bad faith," petitioner "did not ask for punitive damages," and a court may not circumvent their unavailability "by renaming punitive damages 'attorneys' fees.'" *Id.* at 6a-7a. The inherent authority of federal courts to punish misconduct, the court held, "is not a grant of authority to do good, rectify [perceived] shortcomings of the common law * * * , or undermine the American rule on the award of attorneys' fees to the prevailing party in the absence of statute." *Id.* at 7a. Instead, the court said, it is "a residual authority, to be exercised sparingly," for the punishment of misconduct "(1) occurring in the litigation itself, not in the events giving rise to the litigation," and "(2) not adequately dealt with by other rules, most pertinently here Rules 11 and 37 of the Federal Rules of Civil Procedure, which Lenell has not been accused of violating." *Id.* at 7a-8a.

Having concluded that the district court had no authority to sanction respondent for its pre-litigation conduct, the court of appeals turned to the question whether the sanction was permissible on the basis of "Lenell's behavior in the litigation itself." Pet. App. 8a. Observing that the district court had "punished Lenell for having failed to acknowledge liability and spare Zapata and the judge and the jury and the witnesses and so on the burden of a trial," the court found that "the fault here was in no small measure the judge's," because petitioner should have been granted partial summary judgment based on respondent's acknowledgment of liability "for $858,000 of the $890,000 sought in the complaint." *Ibid.* Since it was reversing the award of attorneys' fees, the court did not "pick through the record to see whether some of the counterclaims or other moves by Lenell during the trial were sanctionable apart from Rule 11 and Rule 37." *Id.* at 9a. To

"guid[e] further proceedings on remand," however, the court pointed out that, to the extent that Rules 11 and 37 "place limits on the award of sanctions under them," the limitations "are equally limitations on inherent authority, which may not be used to amend the rules." *Ibid.*

DISCUSSION

The petition for certiorari should be denied. The court of appeals correctly held that the term "loss" in Article 74 of the Convention does not include attorneys' fees and correctly held that a federal court may not use its inherent authority to award attorneys' fees as a sanction for the conduct giving rise to the litigation or for conduct during the litigation that is sanctionable under a statute or rule. These holdings, moreover, do not conflict with any decision of this Court or any other court of appeals. Review is particularly unwarranted because the court of appeals' decision is interlocutory and the district court might impose the same sanctions on remand under the correct legal standards.

A. The Court Of Appeals Correctly Held That Attorneys' Fees Are Not A Form Of "Loss" Under Article 74 Of The Convention And Its Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals

1. Under Article 74 of the Convention, damages for breach of contract consist of the foreseeable "loss" from the breach, but neither Article 74 nor any other provision of the Convention makes any reference to attorneys' fees. Indeed, as Harry M. Flechtner, one of the leading academic authorities on the Convention, has observed, it appears "from the formal records of the [treaty's] history" that "the subject of recovering attorneys' fees never arose during [its] drafting and negotiation." Harry M. Flechtner, *Recovering Attorney's Fees as Damages Under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos*

v. Hearthside Baking, 22 Nw. J. Int'l L. & Bus. 121, 151 (2002). Petitioner nevertheless contends that, because Article 74 "broadly provides for the recovery of *all* foreseeable 'loss[es]'" (Pet. 15), the availability of attorneys' fees is, in the language of Article 7(2), "expressly settled" in the Convention. The court of appeals correctly held otherwise.

Many of the countries that are parties to the Convention have a procedural rule of general applicability concerning a prevailing party's entitlement to an award of attorneys' fees. In some of those countries prevailing parties have such a right. See, *e.g.*, Flechtner, *supra*, 22 Nw. J. Int'l L. & Bus. at 154 n.87 (Germany, France, Italy, Sweden); Joseph Lookofsky, *Commentary: Zapata Hermanos v. Hearthside Baking*, 6 Vindobona J. Int'l Com. L. & Arb. 27, 28 n.10 (2002) (Denmark). In at least one other—the United States—they do not. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Interpreting the term "loss" in Article 74 to include attorneys' fees would thus make what is otherwise an issue of procedure an issue of substantive contract law.[1] Adopting that interpretation would also mean that Article 74 is an exception to the American rule and that it might displace the more general loser-pays rules, and the corresponding bodies of law, that apply in other countries. Because of these far-reaching consequences, it is appropriate to require explicit language addressing attorneys' fees before such an interpretation is adopted. Cf. *Key Tronic Corp.*

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[1] While there may be some debate about whether attorneys' fees are properly construed as procedural or substantive, see, *e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 292 (1994) (Scalia, J., concurring in the judgment), and indeed the proper characterization may depend on context, see, *e.g.*, *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 726 (1988), there is little question that attorneys' fees are an ancillary matter that is distinct from the underlying substantive law of contracts, see, *e.g.*, *Landgraf*, 511 U.S. at 277; *White* v. *New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-452 (1982).

v. *United States*, 511 U.S. 809, 819 (1994) (noting "general practice of not awarding fees to a prevailing party absent explicit statutory authority"). And because there is no such explicit language in the Convention, the proper construction of the term "loss" in Article 74 is that it does not include attorneys' fees, but rather leaves that issue to domestic procedural law. Cf. *id.* at 814-819 (provisions of CERCLA allowing recovery of "necessary costs of response" and "enforcement activities" do not allow recovery of attorneys' fees).[2]

Petitioner's interpretation would also raise difficult questions concerning the relationship between Article 74 and the general attorneys'-fees rules in loser-pays jurisdictions. If foreseeable attorneys' fees were necessarily part of a prevailing plaintiff's "loss," courts in those countries would have to decide whether prevailing defendants could recover attorneys' fees and whether prevailing plaintiffs could recover unforeseeable attorneys' fees that would not constitute a loss under Article 74. As the court of appeals recognized, the availability of an interpretation that avoids these difficulties is "another reason to reject [petitioner's] interpretation." Pet. App. 4a.

Petitioner relies (Pet. 9) on the principle that a treaty should be given "a meaning consistent with the shared ex-

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[2] Article 77 of the Convention, which appears in the same section as Article 74 and requires plaintiffs to "mitigate the loss * * * resulting from the breach," lends further support to this view. If "loss" included attorneys' fees, a defendant would be entitled to a determination of whether the plaintiff had mitigated his attorneys' fees. But the idea of mitigating attorneys' fees is either a *non sequitur* or would require a detailed inquiry into the necessity and reasonableness of the fees, issues presently addressed by domestic law in countries with a loser-pays rule. That the Convention provides no guidance on this matter suggests that the term "loss," in Article 74, encompasses only pre-litigation losses for which mitigation is a workable and established concept.

pectations of the contracting parties," *Air France* v. *Saks*, 470 U.S. 392, 399 (1985), but points to no reason to believe that any party to the Convention expected that a plaintiff's "loss" would include its attorneys' fees, let alone that there was such a "shared" expectation. As the court of appeals correctly observed, "the question whether 'loss' includes attorneys' fees would have held little interest" to the vast majority of the parties, and there is therefore "no reason to suppose they thought about that question at all." Pet. App. 4a. In those countries, which are loser-pays jurisdictions, attorneys' fees are available under domestic procedural law. The question makes a material difference only in an American-rule jurisdiction, and there is simply no reason to think that any other countries considered how Article 74 would apply in American courts. Nor, given the absence of any reference to attorneys' fees in the Convention or its negotiating history, is there any reason to suppose that the United States' representatives thought about that question either, or that the Senate did so when it approved the Convention, much less that there was a knowing and willing decision to abandon the American rule for an entire category of cases.

2. Article 7(1) of the Convention provides that, in interpreting the Convention, "regard is to be had to its international character and to the need to promote uniformity in its application." Petitioner contends (Pet. 8-14) that the court of appeals violated this provision by disregarding decisions of courts in other countries that have interpreted Article 74 to permit an award of attorneys' fees and by applying the American rule instead. This contention is meritless.

a. As an initial matter, petitioner's contention largely begs the question. There is no question that the enforcement of the Convention is left to domestic courts, and its substantive provisions will therefore be enforced through a variety of procedural means. Accordingly, while uniformity

is important in applying the Convention's substantive terms, variation in the procedural rules employed in cases involving the Convention is inevitable. As a result, foreign decisions awarding attorneys' fees to the prevailing party in a contract action under the Convention pursuant to domestic law, or without specifically addressing the scope of the treaty term "loss," do not implicate the interest in the uniform interpretation of *treaty terms*.

Petitioner is also mistaken in its suggestion (Pet. 10-11 & n.5; Reply Br. 1) that there is an international consensus that attorneys' fees are recoverable under Article 74. After surveying the foreign decisions in this area, Professor Flechtner made a number of findings. First, of the seven decisions that have interpreted Article 74 to permit an award of attorneys' fees, none was rendered by the country's highest court and "most were from low-ranking trial-level tribunals." Flechtner, *supra*, 22 Nw. J. Int'l L. & Bus. at 146. Second, those decisions were rendered by courts and arbitration panels in only three countries (Germany, Switzerland, and France), each of which is a "civil law jurisdiction with a loser-pays approach to attorneys' fees in its domestic law." *Id.* at 147. Third, none of the decisions cited any authority from outside its jurisdiction and only one displayed any "awareness that legal systems elsewhere in the world (such as the U.S.) do not routinely allow prevailing litigants to recover attorney costs." *Id.* at 149. Fourth, and most significantly, "probably the vast majority of European cases" governed by the Convention awarded attorneys' fees under the forum's loser-pays rule, and can therefore be viewed as "counter-precedents" to the decisions that awarded such fees under Article 74. *Id.* at 148. Those cases at least implicitly recognize that attorneys' fees are not a recoverable "loss" under Article 74, but rather are recoverable under the domestic law that authorizes the award of fees to prevailing parties. On the basis of these findings, Professor Flechtner concluded that

the decisions interpreting Article 74 to permit the award of attorneys' fees "are due minimal deference as precedents." *Id.* at 150.[3]

In any event, Article 7(1)'s reference to "the need to promote uniformity in [the Convention's] application" is not appreciably different from the rule that judicial decisions from other countries interpreting a treaty term are "entitled to considerable weight." *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (quoting *Air France*, 470 U.S. at 404). And that interpretive principle is subordinate to the most basic ones: that "analysis must begin * * * with the text of the treaty and the context in which the written words are used," *Air France*, 470 U.S. at 397; and end there "where the text is clear," *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). If, however, the text's meaning remains ambiguous, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France*, 470 U.S. at 396 (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-432 (1943)). Those are the principles on which the court of appeals relied. See Pet. App. 3a.

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[3] In a subsequent article, Professor Flechtner and a co-author summarized his findings as follows:

> The small number of sometimes-ambiguous and ill-reasoned precedents favouring an award of Art. 74 damages to cover attorney fees * * * fades to virtual insignificance when compared to the vast—nay, overwhelming—majority of [Convention] decisions in which the recovery of attorney fees has apparently been treated, without comment by the deciding tribunal, * * * as a matter governed by the domestic law of the forum.

Harry Flechtner & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 Vindobona J. Int'l Com. L. & Arb. 93, 95 (2003).

Petitioner does not take the position that foreign decisions must be *followed* in this case. Instead, petitioner contends (Pet. 9; Reply Br. 2) that the court of appeals erred in not *considering* the decisions that awarded attorneys' fees under Article 74. But there is no reason to believe that it did not consider them. The court read the parties' briefs and heard their oral arguments before it issued an opinion holding that "loss" under Article 74 does not include attorneys' fees. In issuing the opinion, the court necessarily rejected all of petitioner's arguments for the contrary view, including any argument based on the decisions of foreign tribunals. See Pet. 10 (foreign decisions "were cited by Zapata"). As a general matter of judicial decisionmaking, a court is not obligated to recite and explicitly address every argument made by the party against which it rules. And it is implausible that the parties to the Convention intended to impose such an obligation for arguments based on foreign decisions by including general language in Article 7(1) about "the need to promote uniformity."

b. Petitioner is also mistaken in its contention (Pet. 8-9, 12-14; Reply Br. 4) that the court of appeals relied on "domestic law" in holding that petitioner was not entitled to attorneys' fees. Contrary to petitioner's suggestion (Pet. 8, 12; Reply Br. 4), the court did not simply apply the American rule but construed the term "loss" in Article 74, just as any court in any country would be required to do if confronted with the question presented here. In construing Article 74, moreover, the court applied universally applicable interpretive principles, which are consistent with the principles of treaty interpretation identified by petitioner's amicus. See Amicus Br. 6-7. The court concluded that "'loss' does not include attorneys' fees" (Pet. App. 2a), because the availability of such fees is governed in most countries by "procedural law" of "general applicability," and there is nothing in the text of the Convention reflecting an intention to make

attorneys' fees part of the substantive law of contracts (*id.* at 3a); because petitioner's interpretation "would produce anomalies" (*id.* at 4a); and because there is no reason to believe that the countries with a loser-pays rule thought about the issue or that the United States would have signed the Convention if it had thought that Article 74 was *sub silentio* displacing the American rule (*ibid.*). Whether one agrees with this analysis or not, it cannot be characterized as narrowly "domestic," particularly because the same analysis would lead to the same interpretation of the term "loss" in a loser-pays jurisdiction (although the plaintiff might be able to recover under the general procedural law governing attorneys' fees).

Contrary to petitioner's contention (Pet. 13-14), the court of appeals' interpretation of the Convention is entirely consistent with the Eleventh Circuit's statement in *MCC-Marble Ceramic Center, Inc.* v. *Ceramic Nuova D'Agostino, S.P.A.*, 144 F.3d 1384, 1391 (1998), cert. denied, 526 U.S. 1087 (1999), that courts may not "substitut[e] familiar principles of domestic law when the Convention requires a different result." The court of appeals did not substitute the American rule for a different rule required by the Convention; it applied the American rule after determining that that principle of domestic law is consistent with the Convention.

B. The Court Of Appeals Correctly Held That A Court May Not Use Its Inherent Authority To Impose A Sanction For Pre-Litigation Conduct Or For Litigation Conduct Sanctionable Under A Statute Or Rule And Its Decision Does Not Squarely Conflict With The Decision Of Any Other Court Of Appeals

In *Chambers* v. *NASCO, Inc.*, 501 U.S. 32 (1991), this Court held that the enactment of statutes and rules authorizing the imposition of sanctions in various circumstances does not preclude a court from using its inherent authority to sanction a party for bad-faith conduct. *Id.* at 46-51. Peti-

tioner asks the Court (Pet. 22-30) to grant certiorari to answer two questions that were not explicitly answered in *Chambers*: whether a court may use its inherent authority to impose sanctions for the conduct giving rise to the litigation; and whether a court may use its inherent authority to sanction conduct that occurred during the litigation but is sanctionable under a statute or rule. As explained below, review is not warranted on either question.

1. In *Chambers*, the Court approved an award of attorneys' fees as a sanction for the defendant's conduct during the litigation of a breach-of-contract suit. 501 U.S. at 54 & n.17. It "express[ed] no opinion as to whether the District Court would have had the inherent power to sanction [the defendant] for conduct relating to the underlying breach of contract." *Id.* at 54 n.16. The four dissenting Justices were of the view that courts do *not* have the authority to sanction a party for pre-litigation conduct (and that the conduct for which sanctions were imposed in that case was in fact pre-litigation conduct, such that the award of attorneys' fees was inappropriate). *Id.* at 60 (Scalia, J., dissenting); *id.* at 72-76 (Kennedy, J., dissenting). Petitioner contends (Pet. 26-28) that there is a circuit conflict on the question left open in *Chambers*, and that the Court should grant certiorari to resolve it. Petitioner overstates the extent of the conflict.

In agreement with the Justices who addressed the issue in *Chambers*, every court of appeals to consider the question has held, correctly, that attorneys' fees may not be awarded solely as a sanction for the conduct giving rise to the litigation.[4] Like the court of appeals in this case (Pet. App. 7a),

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[4] See *Kerin* v. *United States Postal Serv.*, 218 F.3d 185, 195 (2d Cir. 2000) ("bad faith fees may not be awarded solely on the basis of pre-litigation business conduct"); *Towerridge, Inc.* v. *T.A.O., Inc.*, 111 F.3d 758, 766 (10th Cir. 1997) ("circuits that have squarely addressed this issue" have held that "bad faith" exception to American rule "does not reach purely prelitigation * * * conduct"); *Lamb Eng'g & Constr. Co.* v. *Ne-*

those courts concluded that a contrary rule would enable district courts to substitute attorneys' fees for otherwise-unavailable punitive damages and to circumvent the American rule.[5] Petitioner cites only one decision (Pet. 27) in which a court of appeals affirmed an award of attorneys' fees based on pre-litigation conduct. See *United States ex rel. Yonker Constr. Co.* v. *Western Contracting Corp.*, 935 F.2d 936, 942 (8th Cir. 1991) ("Bad faith may occur during either contract performance or litigation."). And as the Eighth Circuit has subsequently made clear, that decision is consistent with the rule that conduct giving rise to the litigation alone cannot justify an award of attorneys' fees, because in that case the defendant "acted in bad faith in performing the []contract *and* in initiating its counterclaim," the latter of which the Eighth Circuit characterized as "litigation conduct." *Lamb*, 103 F.3d at 1436.

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braska Pub. Power Dist., 103 F.3d 1422, 1437 (8th Cir. 1997) ("the district court's inherent power to award attorney fees as a sanction for bad faith conduct does not extend to pre-litigation conduct"); *Association of Flight Attendants* v. *Horizon Air Indus., Inc.*, 976 F.2d 541, 549 (9th Cir. 1992) ("uniform view among the circuits" is that "it is impermissible to allow a District Court acting pursuant to its inherent authority to sanction * * * prelitigation * * * conduct"); *Sanchez* v. *Rowe*, 870 F.2d 291, 294 (5th Cir. 1989) (refusing to extend "bad-faith exception" to American rule to "the acts giving rise to the substantive claim"); *Woods* v. *Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1014 (11th Cir. 1985) ("The bad faith or vexatious conduct must be part of the litigation process itself."); *Shimman* v. *International Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1233 (6th Cir. 1984) (en banc) ("the bad faith exception to the American Rule does not allow an award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim"), cert. denied, 469 U.S. 1215 (1985).

[5] See *Towerridge*, 111 F.3d at 765-766; *Lamb Eng'g & Constr. Co.*, 103 F.3d at 1435; *Association of Flight Attendants*, 976 F.2d at 550; *Sanchez*, 870 F.2d at 294; *Shimman*, 744 F.2d at 1231, 1232 n.9.

As for the narrower question whether a court may sanction pre-litigation conduct when there is also "sanctionable conduct *during* the litigation" (Reply Br. 10), it is not clear that that question will have any significance in this case, because it is not clear how much of the conduct that gave rise to the fee award is properly classified as pre-litigation conduct and whether the amount of fees associated with the litigation conduct alone is materially different from the amount associated with the litigation and pre-litigation conduct together. For example, to the extent that the litigation misconduct is sufficiently egregious to justify an award of all the fees incurred by petitioner, any pre-litigation misconduct could not have any effect on fees. In light of the court of appeals' understandable refusal to "pick through the record" (Pet. App. 9a) and analyze specific fee claims at this interlocutory stage, any difference between the Seventh and Eighth Circuit's approach might have no effect on the fee award.[6]

2. In approving the award of attorneys' fees in *Chambers*, the Court stated that, while a court "ordinarily should rely" on statutes or rules to punish conduct that "could be adequately sanctioned" under them, a court may rely on its inherent authority when the statutes and rules are not "up to the task." 501 U.S. at 50. The Court then noted an exception to this general principle, which it applied in the case

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[6] Even if there is a material difference between the approach of the Seventh Circuit in this case and that of the Eighth Circuit in *Yonker*, the difference does not justify this Court's review. The Eighth Circuit substantially limited *Yonker* in *Lamb*, and also read another Eighth Circuit case narrowly to conform it to the case law of other circuits. See *Lamb*, 103 F.3d at 1435-1436. If allowing sanctions for pre-litigation misconduct when there is also litigation misconduct ever makes a practical difference in application, *Lamb* suggests that the Eighth Circuit might further modify its case law, and in the event it does not, certiorari might then be appropriate.

before it. When conduct sanctionable under statutes or rules is "intertwined" with conduct that is not, the Court said, a court may sanction all of the conduct under its inherent authority, because a contrary requirement would "serve only to foster extensive and needless satellite litigation," which is "contrary to the aim" of the Federal Rules of Civil Procedure. *Id.* at 51. Petitioner contends (Pet. 22-26) that there is a circuit conflict over the meaning of this passage; that, in particular, courts of appeals are divided on the question whether a court may impose sanctions under its inherent authority if the conduct is sanctionable under a statute or rule; and that the Court should grant certiorari to resolve the conflict. Once again, petitioner overstates the conflict.

Petitioner cites no decision (Pet. 24-25; Reply Br. 8-9) that is inconsistent with *Chambers'* teaching that a court should exercise its inherent authority when statutes and rules are not "up to the task." 501 U.S. at 50. In particular, petitioner cites no decision in which a court of appeals found that all of the bad-faith conduct in question was sanctionable under a statute or rule but nevertheless affirmed a sanction imposed under the district court's inherent authority. Two of the decisions cited by petitioner did not address the propriety of an inherent-authority sanction;[7] several did address that issue but were cases in which the conduct was found (or assumed) *not* to be sanctionable under a rule or statute;[8] and

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[7] See *Nick* v. *Morgan's Foods, Inc.*, 270 F.3d 590, 594-595 n.2 (8th Cir. 2001) ("we do not need to rely on the inherent power doctrine because we hold that the district court was authorized to sanction under Rule 16 and the local rules"); *Travelers Ins. Co.* v. *St. Jude Hosp., Inc.*, 38 F.3d 1414, 1418 (5th Cir. 1994) (rejecting claim that "a court must consider Rule 11 before [28 U.S.C.] § 1927").

[8] See *Pickholtz* v. *Rainbow Techs., Inc.*, 284 F.3d 1365, 1376 (Fed. Cir. 2002) (Fed. R. Civ. P. 37 "[wa]s not a proper basis for awarding attorney fees"); *DLC Mgmt. Corp.* v. *Town of Hyde Park*, 163 F.3d 124, 135 (2d Cir. 1998) (sanctions "could not have been granted pursuant to Fed. R. Civ. P.

one fell within *Chambers*' exception for cases in which "the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address" (501 U.S. at 51).[9] The other two decisions that petitioner cites are ambiguous. One of them rejected the argument that the district court should have "consider[ed] sanctions available under Rule 11 or 28 U.S.C. § 1927" before considering the use of its inherent authority. *Fink* v. *Gomez*, 239 F.3d 989, 994 (9th Cir. 2001). It is not at all clear that that decision supports petitioner's position, however, because there was no finding that the conduct in question was in fact covered by Rule 11 or Section 1927, and the court of appeals' response to the argument that they should have been considered was a paraphrase of *Chambers*' statement that a court may rely on its inherent authority when the statutes and rules are not "up to the task." 501 U.S. at 50.[10] In the other decision, the court said, in a footnote, that the fact that sanctions "may have been possible" under a statute or rule "did not negate the district court's inherent power to levy sanctions." *Thomas* v. *Tenneco Packaging Co.*, 293 F.3d 1306, 1328 n.32 (11th Cir. 2002). But since there was no

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37 * * * or 42 U.S.C. § 1988"); *In re Weiss*, 111 F.3d 1159, 1172 (4th Cir.) (conduct "d[id] not technically fall under the auspices of [Bankruptcy] Rule 9011"), cert. denied, 522 U.S. 950 (1997); *Resolution Trust Corp.* v. *Dabney*, 73 F.3d 262, 267 (10th Cir. 1995) (assuming that "it w[as] error for the district court to base its sanction [on 28 U.S.C.] § 1927"); *In re Mroz*, 65 F.3d 1567, 1574 (11th Cir. 1995) (Bankruptcy Rule 9011 did not cover conduct).

[9] See *First Bank of Marietta* v. *Hartford Underwriters Ins. Co.*, 307 F.3d 501, 513, 516-518 (6th Cir. 2002).

[10] Compare *Fink*, 239 F.3d at 994 ("[T]he district court may, in its informed discretion, rely on inherent power rather than the federal rules or § 1927. *See Chambers*, 501 U.S. at 50.") with *Chambers*, 501 U.S. at 50 ("[I]f in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.").

finding that all (or even any) of the conduct at issue was sanctionable under a statute or rule, it is not clear whether that language should be read to mean that a court may rely on its inherent authority even when a statute or rule is "up to the task" (*Chambers*, 501 U.S. at 50) or only that "the various sanctioning provisions" of the statutes and rules do not "reflect a legislative intent to displace the inherent power" (*id.* at 42-43).

C. The Interlocutory Posture Of The Case Is An Additional Reason To Deny Certiorari

The court of appeals held that attorneys' fees are not a form of "loss" under Article 74 of the Convention and that a district court may not use its inherent authority to award attorneys' fees as a sanction either for the conduct that gave rise to the litigation or for conduct during the litigation that is sanctionable under the Federal Rules of Civil Procedure. The court did not hold, however, that petitioner was not entitled to attorneys' fees. Instead, it remanded the case so that the district court could decide whether any of respondent's litigation conduct was sanctionable "apart from Rule 11 and Rule 37." Pet. App. 9a. This Court will "generally await final judgment in the lower courts before exercising [its] certiorari jurisdiction," *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari), and there is good reason to follow that practice here.

On remand, it is possible that the district court will find that respondent engaged in bad-faith conduct during the course of the litigation and that at least some of that conduct is "not adequately dealt with by other rules." Pet. App. 7a. If it makes such a finding, it may be able—and may choose—to impose the same sanction that was imposed before the appeal, a result that would render irrelevant the answers to the questions presented in the petition. Even if the ques-

tions otherwise warranted the exercise of this Court's certiorari jurisdiction, therefore, the interlocutory posture of the case would "furnish[] sufficient ground" for denial of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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